# OFFICIAL CODE OF GEORGIA ANNOTATED

## 2012 Supplement

Including Acts of the 2012 Regular Session of the General Assembly

*Prepared by*

The Code Revision Commission

The Office of Legislative Counsel

*and*

The Editorial Staff of LexisNexis®

Published Under Authority of the State of Georgia

## Volume 20

### 2010 Edition

Title 24. Evidence

Including Annotations to the Georgia Reports
and the Georgia Appeals Reports

**Place in Pocket of Corresponding Volume of Main Set**

**LexisNexis®**
**Charlottesville, Virginia**

ISBN 978-0-327-11074-3 (set)
ISBN 978-1-4224-6357-4

5014029

(Pub.41805)

## THIS SUPPLEMENT CONTAINS

**Statutes:**

All laws specifically codified by the General Assembly of the State of Georgia through the 2012 Regular Session of the General Assembly.

**Annotations of Judicial Decisions:**

Case annotations reflecting decisions posted to LexisNexis® through March 30, 2012. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

**Annotations of Attorney General Opinions:**

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 30, 2012.

**Other Annotations:**

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

**Tables:**

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2012 Regular Session of the General Assembly.

**Indices:**

A cumulative replacement index to laws codified in the 2012 supplement pamphlets and in the bound volumes of the Code.

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# TITLE 24

## (EFFECTIVE UNTIL JANUARY 1, 2013)



## (EFFECTIVE JANUARY 1, 2013)

# TITLE 24

# EVIDENCE

Chap.

4. Proof Generally, 24-4-1 through 24-4-65.

9. Witnesses Generally, 24-9-1 through 24-9-108.

10. Securing Attendance of Witnesses and Production and Preservation of Evidence, 24-10-1 through 24-10-154.

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**Editor's notes.** — Ga. L. 2011, p. 99, § 2, and Ga. L. 2012, p. 651, § 2-1/HB 46, revised Title 24, effective January 1, 2013. For the version of Title 24 effective until January 1, 2013, consult the bound volume and the Code sections in this version of Title 24 in the supplement. For the version effective January 1, 2013, see the version of Title 24 following this version.

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## CHAPTER 1

## GENERAL PROVISIONS

### 24-1-1. (Effective until January 1, 2013) Definitions.

**Law reviews.** — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

#### JUDICIAL DECISIONS

Analysis

General Consideration
Direct Evidence

**General Consideration**

**Cited** in State v. Bunn, 288 Ga. 20, 701 S.E.2d 138 (2010).

**Direct Evidence**

**Direct evidence was sufficient.** Evidence was sufficient to establish that the defendant killed a neighbor's dog without justification because the defendant had previously told the neighbor that the defendant shot and killed the dog; pursuant to O.C.G.A. § 24-1-1(3), those prior admissions were direct evidence that the defendant killed the dog. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

# CHAPTER 2

# RELEVANCY

## 24-2-1. (Effective until January 1, 2013) Relevancy required.

### JUDICIAL DECISIONS

ANALYSIS



#### Civil Cases

**Evidence in condemnation case.**

In a condemnation action, the trial court erred in denying a lessor's motion in limine to exclude evidence of the lessor's entitlement to statutory pre-judgment interest under O.C.G.A. § 32-3-19 because the fact that the trial court could later instruct the jury to disregard irrelevant evidence was not a reason to allow the jury to hear the irrelevant evidence; under the statutory framework of § 32-3-19, the amount of pre-judgment interest due a condemnee is determined after the jury enters a verdict. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

In a condemnation proceeding, the trial court did not abuse the court's discretion in denying the lessees' motion in limine to exclude evidence that the lessees and the lessor knew of the possible condemnation when the lessees sold the property to the lessor because the Georgia Department of Transportation (DOT) sought to use the evidence to discredit the estimate the lessees and lessor made of the property's market value at the time of the taking by challenging the use of the sale as a factor in reaching that estimate used in that way, the evidence of the knowledge of a possible condemnation would bear, at least indirectly, on the question of the just and adequate compensation due the condemnees. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

In a condemnation proceeding, the trial court did not err in denying a motion in limine to exclude evidence of the rent a lessee charged a sublessee for use of the property before the lessee sold the property to a lessor because the evidence bore upon the property's market value. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

In a condemnation proceeding, the trial court erred in denying the lessees' motion in limine to exclude evidence of the cause of the fire that damaged the restaurant that was on the real property at issue because evidence concerning the reasons giving rise to the uncertainty in insurance coverage (i.e., the cause of the fire), as opposed to the fact of uncertainty, was not relevant to the issue of just and adequate compensation. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

**Evidence not relevant.**

Trial court properly granted an insurer's motion in limine to exclude all evidence of bad faith and claims handling from the coverage trial because the trial court reasonably concluded that information involving bad faith and whether the insurer acted appropriately with respect to claims administration exceeded the scope of the coverage issues; the trial court found that issues regarding the insurer's handling of the claim and whether the insurer abided by the insurer's claims manual related to bad faith, not coverage, and thus could not be addressed by either party during the coverage phase. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011).

Trial court did not err in refusing to

permit record title holder's descendants to show that a developer agreed to pay a property owner for an easement on the property because the trial court correctly limited the evidence to the issue of adverse possession; the developer's offer to pay the owner was irrelevant to the issues decided by the jury. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697 (2012).

**Limine ruling not violated.** — Trial court did not abuse the court's discretion in concluding that an insurer did not violate the court's limine ruling excluding all evidence of bad faith and claims handling by submitting evidence that an insured did not claim that a disability arose from injury until after the insured's benefits were terminated under the sickness clause of the insurance policy because evidence relating to how the insurer characterized the condition was relevant to whether the condition arose from an injury or a sickness; although the insurer's assertion that the insured received payment under the policy potentially touched on claims handling, it also gave the jury context for how the disability claim and the litigation arose. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011).

**Criminal Cases**

**1. Relevant Evidence**

**Evidence cumulative of defendant's testimony.** — Trial court did not err by limiting the testimony of a witness because the defendant did not establish that the witness's testimony was relevant to the aggravated stalking offenses as charged; the excluded evidence would have been cumulative of the defendant's trial testimony that the defendant was not personally following or watching the victim. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

**Molestation allegations not relevant.** — Trial court did not err by excluding the proffered testimony of a witness concerning allegations of abuse by the victim's son against the daughter of the defendant and the victim because the trial court was authorized to conclude that the substantive molestation allegations were not relevant to the aggravated stalking charges against the defendant; the defendant was otherwise allowed to challenge the victim's motives and truthfulness without interjecting immaterial matter at the trial. Brooks v. State, 313 Ga. App. 789, 723 S.E.2d 29 (2012).

## 24-2-2. (Effective until January 1, 2013) Character and conduct of parties generally irrelevant; exception.

**Law reviews.** — For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010).

### JUDICIAL DECISIONS

Analysis



**Civil Cases**

**Similar transaction evidence on failure to pay.**

Trial court did not abuse the court's discretion in ruling that a widow could not introduce evidence of an insurer's conduct towards insureds in two prior cases in which the court refused to honor incontestability clauses to demonstrate bad faith because the trial court was entitled to find that the prior cases were materi-

ally dissimilar from the widow's case, given that neither of those cases involved coverage under the group policy at issue and the revisions to the certificate of insurance forms made that year. Flynt v. Life of the South Ins. Co., 312 Ga. App. 430, 718 S.E.2d 343 (2011), cert. denied, 2012 Ga. LEXIS 305 (Ga. 2012).

**Evidence of similar acts in negligence cases.**

In an action alleging that the owner of an apartment complex breached a duty to keep the premises safe, the trial court did not abuse the court's discretion when the court refused to admit evidence of a carjacking that occurred near the complex because the carjacking occurred on a public street and in a location of unknown proximity to the complex. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, 2012 Ga. LEXIS 270 (Ga. 2012).

**Pastor testifying to truthfulness of parties.** — Trial court erred by admitting the testimony of a pastor regarding the reputation for truthfulness of a husband and a wife and that the pastor would believe the husband and the wife under oath because the claims of the husband and wife did not involve the general character of the parties pursuant to O.C.G.A. § 24-2-2; the error was not harmless because the jury's verdict was based in large part upon the jury's determinations regarding the parties' credibility. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

## Criminal Cases

### 1. Character

**A passing reference to a defendant's record, etc.**

Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial, which was based on the admission of a recorded telephone conversation between the defendant and the defendant's mother, who stated "because it's on your record," in response to why the defendant could not be disappointed if the defendant was denied bond; the comment was fleeting and was not a direct comment about the defendant's criminal history, and the mother did not comment on the content of the defendant's criminal record or even say, with certainty, that one did or did not exist. Hamrick v. State, 304 Ga. App. 378, 696 S.E.2d 403 (2010).

Trial court did not abuse the court's discretion by denying a motion for a mistrial because, although a reference by a defense witness on cross-examination to the defendant's photograph having been pulled from the website of the Georgia State Board of Pardons and Paroles was improper, the curative instruction which the trial court gave was sufficient to remedy any prejudice arising from the answer. Moreover, the evidence of guilt in the case was overwhelming, such that the comment likely did not affect the outcome of the trial. Russell v. State, 308 Ga. App. 328, 707 S.E.2d 543 (2011).

**Defendant's character not "put in issue."**

Trial court did not err by denying the defendant's motion for mistrial with respect to a nonresponsive answer by an accomplice when the accomplice was asked on direct examination whether the accomplice had a conversation with defendant about a pistol in the defendant's possession on the day of the shooting because a nonresponsive answer that impacted negatively on the defendant's character did not improperly place the defendant's character in issue; moreover, the defendant declined the trial court's offer to give a curative instruction with regard to the statement. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224 (2010).

Trial court did not err by denying the defendant's motion for mistrial due to the prosecutor's questioning an accomplice as to whether the accomplice had spoken with the defendant on the previous day because the possibility that the defendant had spoken with the accomplice did not necessarily imply that the defendant too was in custody; even if it did, a passing reference to the defendant's incarceration did not place the defendant's character in evidence. Lewis v. State, 287 Ga. 210, 695 S.E.2d 224 (2010).

Trial counsel did not place the defendant's character in issue by conceding the defendant's guilt of aggravated assault because the concession related to the facts alleged and crimes charged in the case,

not to other transactions reflective of the defendant's character; given that numerous witnesses testified that the defendant had a bat on the night in question and struck the victim in the head with the bat while only one witness testified that the defendant took the victim's wallet out of the victim's pocket, trial counsel's strategy of contesting only the armed robbery count was reasonable and not ineffective. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

Trial court did not err in denying the defendant's motion for a mistrial after an investigating officer testified on cross-examination that the defendant gave the officer a statement right after the defendant talked with the defendant's parole officer because the testimony followed defense counsel's question regarding the content, not the timing of the defendant's statement; a passing reference to a defendant's record does not place his or her character in evidence, and a nonresponsive answer that impacts negatively on a defendant's character does not improperly place his or her character in issue. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010).

Defendant failed to establish a claim of ineffective assistance of counsel due to counsel's failure to seek a mistrial after successfully objecting to a witness's testimony that the defendant told the witness that "he would have a shoot-out with police before he ever went back to jail" on the ground that the witness's response placed the defendant's character in evidence because even if counsel's failure to request a mistrial were deemed deficient, no mistrial would have been granted as a nonresponsive answer that impacted negatively on a defendant's character did not improperly place the defendant's character in issue. Billings v. State, 308 Ga. App. 248, 707 S.E.2d 177 (2011).

**Use of booking photographs.**

Trial court erred by admitting the defendant's mug shot from a prior arrest because the mug shot used in the photo array could not have been related to the crime for which the defendant was being tried, but it would have to be related to a prior crime; however, the error was harmless based on the overwhelming evidence of the defendant's guilt. Sharpe v. State, 288 Ga. 565, 707 S.E.2d 338 (2011).

Agent's reference to the defendant's mug shot from a previous arrest was harmless because there was overwhelming evidence of the defendant's guilt. Butler v. State, 290 Ga. 425, 721 S.E.2d 889 (2012).

**Admission of videotape.**

Trial court did not err by admitting improper character evidence, consisting of video and photographs of the defendant stealing laptops, because the evidence showed the theft of the laptops the defendant was accused of receiving; the videotape was relevant to show that the laptops at issue were stolen. Fields v. State, 310 Ga. App. 455, 714 S.E.2d 45 (2011).

**Evidence of motive.**

Trial counsel did not "open the door" to bad character evidence by stating that the evidence would show that the victim previously stole the defendant's cash and marijuana because evidence concerning the victim's transaction with the defendant and the defendant's subsequent suspicion that the victim stole the defendant's marijuana and money was admissible as evidence of prior difficulties between the two and was relevant to show the defendant's motives. Taylor v. State, 304 Ga. App. 395, 696 S.E.2d 686 (2010).

**Evidence of drug use.**

Because evidence of the defendant's prior drug use was introduced to show evidence of motive, it did not violate O.C.G.A. § 24-2-2; therefore, counsel was not ineffective for failing to raise a meritless objection. Simons v. State, 311 Ga. App. 819, 717 S.E.2d 319 (2011).

**Evidence of Gothic beliefs or Satanism.** — Trial court erred in admitting photographs of the defendant with dyed black hair and dark make-up, a document bearing the words of a "curse" to be recited while burning the letter over a black candle, and seven different inscriptions bearing themes of anguish, enslavement, atheism, and violence because nothing in the challenged evidence explicitly referenced Satanism or "gothic" beliefs and there was no testimony linking the inscriptions or other evidence to any such ideology. The trial court abused the court's discretion in admitting the challenged ev-

idence, which bore no specific connection to the crime and operated to impugn the defendant's character. Boring v. State, 289 Ga. 429, 711 S.E.2d 634 (2011).

**Evidence incidentally reflecting on character not barred.**

Trial court did not err in denying the defendant's motion for a mistrial based on an allegation that the defendant's character was impermissibly placed into evidence because the challenged testimony was no more than a fleeting comment, and, thus, the trial court was authorized to find that its effect was not prejudicial enough to warrant a mistrial; because defense counsel declined the trial court's offer to give curative instructions to the jury, the defendant would not be heard to complain. Bowen v. State, 304 Ga. App. 819, 697 S.E.2d 898 (2010).

Trial court did not err in failing to grant a mistrial after a witness testified that the witness was afraid of the defendant and the defendant's friends because although the testimony put the defendant's character in evidence, the testimony was admissible since the testimony was relevant to the witness's credibility and was being used to show that the witness was testifying by reason of duress or fear; in light of the fact that four other witnesses independently testified that the witnesses also observed the defendant shoot the victim and picked the defendant out of a photographic lineup, even if the witness's testimony was improper, any error was harmless. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial court did not err in denying the defendant's motion in limine to redact references in the defendant's statement to previous drug transactions because the statement was relevant to the issue of the defendant's intent; any potential error caused by the inclusion of the defendant's references to previous drug transactions amounted to harmless error in light of the overwhelming evidence against the defendant, including the defendant's own statement admitting to drug dealing. Nowell v. State, 312 Ga. App. 150, 717 S.E.2d 730 (2011).

**Statements as to defendant's drinking habits.**

Testimony that a defendant drank alcohol did not place defendant's character in issue under O.C.G.A. § 24-2-2; further, testimony that the defendant had been drinking on the night of the crimes of child molestation of the defendant's daughter concerned the res gestae of the incident, which the state was entitled to present even if the defendant's character was incidentally placed in issue. Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155 (2010).

**When defendant put defendant's character in issue, etc.**

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to the defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when the court held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

**Evidence properly admitted as res gestae and did not amount to bad character evidence.**

Trial court did not err by ruling that the state was not required to redact from a recording allegedly irrelevant and prejudicial statements the defendant made during the course of the offense; evidence of statements made by the defendant during the commission of the offense are admissible as part of the res gestae of the crime even if the evidence puts the defendant's character in evidence. Ware v. State, 308 Ga. App. 24, 707 S.E.2d 111 (2011).

Trial counsel was not deficient for failing to object to the victim's testimony regarding the defendant's excessive alcohol consumption, mental health problems, and possession of a handgun because the evidence was part of the res gestae of the numerous incidents of prior difficulties between the victim and the defendant; the evidence was relevant and admissible,

even if the evidence incidentally placed the defendant's character in issue. Billington v. State, 313 Ga. App. 674, 722 S.E.2d 395 (2012).

**Bad character evidence improperly admitted.** — Trial court erred in permitting a witness to testify that the witness saw the defendant with a pistol because the witness testified that the young defendant pulled out the gun while in a group of people at a shopping mall, and such testimony imputed bad character to the defendant. The trial court admitted the bad character evidence after defense counsel inquired into how the police had procured the witness's statement, but that inquiry had no bearing on the defendant's character and thus did not open the door to permit the introduction of character evidence. Lee v. State, 308 Ga. App. 711, 708 S.E.2d 633 (2011).

**Claim waived.**

Because the defendant did not contend at trial that testimony was improper character evidence or violated the defendant's Sixth Amendment right of confrontation, those bases for objections were not preserved for review on appeal. Sanders v. State, 290 Ga. 445, 721 S.E.2d 834 (2012).

**Counsel was not ineffective in failing to object to statements that might have impugned defendant's character, etc.**

Trial counsel was not ineffective for failing to move for a mistrial when a state's witness interjected bad character evidence because the witness's improper remarks were fleeting, unsolicited, and nonresponsive to the prosecutor's examination questions, and since the defendant did not show that the defendant was otherwise entitled to a mistrial based upon the circumstances, trial counsel's failure to pursue a meritless motion does not constitute ineffective assistance of counsel; the trial court sustained the objections to the improper testimony and instructed the prosecutor and witness to restrict the examination and responses, the witness and prosecutor complied with the trial court's instructions, and there was no further mention of the bad character evidence. Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Defendant failed to establish that there was a reasonable probability that, but for the alleged deficiencies of trial counsel, the outcome of the trial would have been different because even assuming that trial counsel performed deficiently by failing to object to character evidence, the defendant failed to show a reasonable probability that the outcome of the trial would have been different; the evidence of the crime charged was overwhelming. Lowe v. State, 310 Ga. App. 242, 712 S.E.2d 633 (2011).

### 2. Other Conduct or Crimes

**Proper admission of similar transaction evidence, etc.**

During the defendant's trial for malice murder and drug-related offenses, the trial court did not abuse the court's discretion in admitting as similar transaction evidence testimony regarding the defendant's previous arrest on a charge of possession of cocaine with intent to distribute and a prior shooting incident because a drug sting was similar to the cocaine trafficking in that both involved relatively recent arrangements for appellant to sell cocaine, and the shooting incident was probative of defendant's inclination towards unprovoked gun violence; the similar transactions were offered to prove, inter alia, intent and state of mind, the trial court admitted the evidence for those limited purposes only, and the trial court instructed the jury accordingly. Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010).

**Admission of family fight over insurance.** — Trial court did not abuse the court's discretion in denying the defendant's motion for a mistrial after the prosecutor elicited the defendant's prior admissions that the defendant had the defendant's spouse killed in order to show that the defendant's children were involved in litigation over an insurance policy based on a legitimate desire to insure that the defendant was not rewarded for taking their mother from them because the defendant introduced the family fight over insurance proceeds, which were payable on the death of the defendant's spouse, in an effort to undercut the credibility of the defendant's children, who testified that the defendant admitted kill-

ing the victim. Cantera v. State, 304 Ga. App. 289, 696 S.E.2d 354 (2010).

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984 was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

Trial court did not abuse the court's discretion in admitting evidence of the defendant's prior drug sales as similar transactions for the purpose of showing the defendant's bent of mind and course of conduct because at trial the defendant denied having any knowledge of the cocaine found in the defendant's vehicle or about the sale of cocaine to an informant; therefore, based on the similarity of the prior crimes with the offense at issue, including the similar hand-to-hand nature of the sale of the same drug, for the same price, at a similar time of day, in the same general area, there was no abuse of the trial court's discretion in admitting the evidence of prior drug sales as similar transactions for the purpose of showing the defendant's bent of mind and course of conduct. Robertson v. State, 306 Ga. App. 721, 703 S.E.2d 343 (2010).

Given the similarities between the theft of a car and the theft of a second vehicle only hours after the car was stolen, evidence of either theft would be admissible as a similar transaction of the other to show bent of mind, intent, and course of conduct; both crimes occurred in the same city and on the same date, both involved the theft of foreign-made, mid-size sedans, and the state presented evidence from which the jury could infer that, like the car, the keys had been left in the second vehicle at the time the car was stolen, and the keys from both cars were missing when the cars were recovered. Ferguson v. State, 307 Ga. App. 232, 704 S.E.2d 470 (2010).

Trial court did not err in permitting testimony and argument about a prior robbery at a video store because evidence relating to the first crime was not wholly unrelated to the charged crimes, nor was the evidence so remote in time as to make the evidence inadmissible; an officer's business card containing information relating to the earlier robbery of the video store was admissible because the evidence was relevant to the identity of the accused and was an article connected with the charged offense and recovered during the search of the codefendant's apartment, and although it was improper to permit testimony and argument that went beyond identifying the business card as an article taken in the prior robbery, the error did not require reversal since there was overwhelming evidence of the codefendant's guilt. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Trial court did not abuse the court's discretion by permitting witnesses to mention in their testimony, and the prosecutor to mention during the prosecutor's opening statement and closing argument, a prior robbery of a video store because the evidence and statements did not constitute evidence of or statements concerning similar transactions which the state sought to use against the defendant; the state did not suggest, nor could it be reasonably inferred from the evidence, that the defendant was implicated in any way in the prior robbery, and adherence to Ga. Unif. Super. Ct. R. 31.1 and 31.3 was not required because that evidence and those statements did not place the defendant's character in issue. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under O.C.G.A. § 24-2-2 during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two days later, in each instance the defendant became acquainted with male college students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to

appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

Trial court's decision to admit evidence of the defendant's prior handgun theft was not an abuse of the court's discretion because in both the earlier theft and the murder for which the defendant was convicted, the defendant stole 9 millimeter handguns from individuals with whom the defendant had a close relationship and access, and then the defendant lied to police in order to avoid arrest and prosecution. Hunt v. State, 288 Ga. 794, 708 S.E.2d 357 (2011).

Trial court did not err in admitting evidence of two prior burglaries as similar transactions under O.C.G.A. § 24-2-2 during the defendant's trial for burglary, O.C.G.A. § 16-7-1, because the trial court's finding that the offenses satisfied the similarity requirement was not clearly erroneous; there was evidence that the defendant was in a house on the day before the burglary was discovered and was found wearing stolen sunglasses two days later, in each instance the defendant became acquainted with male college students by asking for money or odd jobs and later, when the victims' house appeared to be vacant, entered without authority to appropriate the victims' goods, and the burgled houses were within one mile of each other. Long v. State, 307 Ga. App. 669, 705 S.E.2d 889 (2011).

During the defendant's trial for felony murder, malice murder, aggravated assault, and possession of a firearm by a convicted felon, the trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's involvement in a prior shooting as a similar transaction based on the similarities that the defendant used a handgun, committed the offenses with little or no provocation, fled the scene, and attempted to cause serious injury or death in the same immediate location; the crimes need not be exactly alike for the crimes to be sufficiently similar. Evans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011).

During defendant's trial for possession of methamphetamine and possession of marijuana, the trial court did not abuse the court's discretion in admitting evidence of the defendant's prior conviction on an obstruction charge because the trial court admitted the evidence for the purpose of showing the defendant's course of conduct only after conducting a hearing pursuant to Ga. Unif. Super. Ct. R. 31.3(B), which it was required to do, and the state satisfied the criteria delineated in Rule 31.3 for the admission of similar-transaction evidence; even assuming that the similar-transaction evidence should have been excluded, any error in the evidence's admission was harmless because there was videotaped evidence that the defendant was driving an obviously stolen vehicle, that the defendant fled from officers who attempted to conduct a traffic stop, that the defendant continued to lead the officers on a chase even after the defendant's tires had been flattened, that the defendant ultimately exited the vehicle and ran on foot, and that methamphetamine and marijuana not belonging to the owner were found inside the vehicle in which the defendant was the sole occupant. Mangum v. State, 308 Ga. App. 84, 706 S.E.2d 612 (2011).

Trial court did not abuse the court's discretion in admitting similar transaction evidence because both the prior incident and the incident for which the defendant was convicted involved the possession of cocaine since the prior possession was for the purpose of distribution, inasmuch as the evidence showed that the defendant did, in fact, distribute cocaine on that occasion, and the possession for which the defendant was convicted was for an unknown purpose and not clearly for personal use; one incident involved possession and sale of less than one gram of cocaine, the other involved possession of less than two grams of cocaine, and both incidents occurred in the county within a span of two weeks. Gaudlock v. State, 310 Ga. App. 149, 713 S.E.2d 399 (2011).

**Similar transaction notice was sufficient.**

Trial court committed no error in allowing the introduction of similar transaction evidence because the trial court was authorized to conclude that the defendant received adequate notice of the similar

transactions prior to trial and was not prejudiced by the state's failure to attach the accusation and guilty plea to the state's notice pursuant to Ga. Unif. Super. Ct. R. 31.3; the prosecutor informed the trial court that since the defendant's counsel entered the case, the prosecutor had a number of discussions with counsel about the defendant's prior drug conviction as part of plea negotiations, and the similar transaction notice the state filed included information identifying the similar transaction, including the date of occurrence, the county in which the crime occurred, the case number, and the date of the guilty plea, as well as a list of potential witnesses who had been involved in the case and their contact information. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

**Evidence of prior difficulties between victim and defendant, etc.**

Evidence plainly was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of aggravated assault with a deadly weapon in violation of O.C.G.A. § 16-5-21(a)(2) and battery in violation of O.C.G.A. § 16-5-23.1(a) because the state presented more than ample evidence that the defendant's use of force was not justified under O.C.G.A. § 16-3-21(a); the prior and subsequent difficulties evidence and the similar transaction evidence the state presented supported the jury's decision to give little credence to the defendant's self-defense claim. Whitley v. State, 307 Ga. App. 553, 707 S.E.2d 375 (2011).

There was no reversible error, much less any "plain error" pursuant to O.C.G.A. § 17-8-58(b), in the trial court's decision to give a prior difficulties charge to the jury because evidence was presented regarding prior difficulties between the defendant and the victim, and thus, the inclusion of a prior difficulties charge did not constitute an impermissible comment on the evidence; the defendant testified that the defendant and the victim "had problems" on more than one occasion, that the victim had called the police because of those problems "a few times," and that the defendant's mother had helped the defendant move out of the victim's house once before, telling the victim not to let the defendant move back in. Jones v. State, 289 Ga. 145, 710 S.E.2d 127 (2011).

**Incident involving same victim was not a similar transaction.** — During defendant's trial for aggravated stalking, the state was permitted to introduce evidence showing that the defendant violated a bond condition by accosting the victim at a department store. The encounter at the store was not a similar transaction just because the encounter involved the same victim; the state gave the defendant notice of the state's intent to submit the evidence, and gave a limiting instruction before the evidence was introduced. Reed v. State, 309 Ga. App. 183, 709 S.E.2d 847 (2011).

Evidence supported the trial court's charge on the law regarding prior difficulties between the defendant and the victim because the defendant was charged with child molestation for placing his penis on or about the victim's vagina with criminal attempt to commit rape, and with false imprisonment for illegally detaining the victim, but the victim also testified to various other instances of the defendant touching her breasts and vagina, all of which constituted evidence of prior difficulties; by giving the charge, the trial court was not commenting on the evidence. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205 (2011).

**Database match of DNA profile admissible.** — Testimony concerning a CODIS database match of the defendant's DNA profile was relevant and admissible because the DNA evidence did not, in and of itself, constitute impermissible character evidence since no reference was made as to why the matching sample was collected or stored and no reference was made linking the defendant's DNA profile to other criminal activity. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

**Trial court properly admitted similar transaction evidence to show a defendant's course of conduct and intent, etc.**

Trial court did not err in admitting a prior shooting as similar transaction evidence because the trial court admitted the evidence for the limited, proper purpose of establishing the defendant's bent of mind

and course of conduct and instructed the jury on several occasions to consider it for this purpose alone; both the prior shooting and the crime for which the defendant was convicted involved nighttime shootings occurring less than two weeks apart, wherein a man emerged from a gold car in the parking lot of an apartment complex and opened fire with little apparent provocation. Johnson v. State, 289 Ga. 22, 709 S.E.2d 217 (2011).

During the defendant's trial for rape, the trial court did not err by permitting the state to present evidence of a prior similar transaction because the prior transaction evidence was proper and not foreclosed by collateral estoppel since identity and commission of the act were not at issue in the first trial; identity was not an issue in the prior case because the defendant claimed that consensual sex, and in the case before the trial court, identity was one of the purposes for which the state sought to have the similar transaction evidence admitted since the defendant claimed that he did not know the victim and had not raped her. Bell v. State, 311 Ga. App. 289, 715 S.E.2d 684 (2011).

**Evidence of prior rape admissible.** — Trial court acted within the court's discretion in admitting evidence of a prior rape because the state did not seek to introduce evidence of the prior rape to raise an improper inference concerning the defendant's character but rather to show the defendant's intent, bent of mind, and course of conduct, all of which were proper purposes; the prior and present rapes also were sufficiently similar because in both rapes, the defendant sexually attacked a young Spanish-speaking woman after the defendant had been drinking alcohol, the defendant threatened both victims, and the two attacks occurred only a few months apart. Alvarez v. State, 309 Ga. App. 462, 710 S.E.2d 583 (2011).

**Admission of sheriff's statements regarding run-ins with law.** — Even if the mention by sheriff's deputies of the defendant's previous run-ins with the law had impermissibly placed the defendant's character at issue during the trial, any such error would have been harmless due to the overwhelming evidence of the defendant's guilt. Furthermore, none of the trial testimony at issue remotely suggested that the defendant had ever been convicted of a past crime. Moore v. State, 310 Ga. App. 106, 712 S.E.2d 126 (2011).

**Testimony as to circumstances connected with the accused's arrest, etc.** Trial counsel was not ineffective for failing to object to a witnesses reference to marijuana because any challenge to the testimony would have failed; even if the testimony incidentally placed the defendant's character in issue, all circumstances with an accused's arrest were admissible if the circumstances were shown to be relevant, and that was so even if the evidence incidentally put the accused's character in issue. Odom v. State, 304 Ga. App. 615, 697 S.E.2d 289, cert. denied, No. S10C1801, 2010 Ga. LEXIS 927 (Ga. 2010).

**Identity, motive, malice, intent, plan, scheme, bent of mind, and course of conduct.**

Trial court did not err in finding that similar transaction evidence was relevant and admissible because some of the offenses committed during the coconspirators' crime spree were very similar to the crimes for which the defendant was indicted and, therefore, were relevant and admissible to demonstrate the coconspirators' modus operandi, identity, bent of mind, and motive; even if some of the separate offenses were insufficiently similar to the indicted offenses, the evidence showed that each of the offenses was an essential part of a continuing criminal enterprise in which the defendant and the coconspirators acted in concert and with a common purpose. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

**Evidence of similar or connected sexual offenses against children, etc.**

During the defendant's trial for aggravated child molestation and child molestation, the trial court did not abuse the court's discretion in admitting the similar transaction evidence regarding the defendant's prior aggravated molestation of another young boy because the evidence of the defendant's prior aggravated child molestation was appropriate for showing the defendant's lustful disposition toward mo-

lesting young boys; the state indicated that the state wished to introduce the similar transaction evidence for all appropriate purposes: identity, plan, motive, bent of mind, and course of conduct. Jackson v. State, 309 Ga. App. 450, 710 S.E.2d 649 (2011).

Trial court did not err in admitting similar transaction evidence because certified copies of the defendant's prior conviction were sufficient to prove not only the similarity between the crimes for which the defendant was convicted, aggravated sexual battery, aggravated sodomy, child molestation, and enticing a child for indecent purposes, and the former crimes but also to establish that the defendant was, in fact, convicted of those offenses; the certified copies the state submitted included an indictment charging the defendant with continuous sexual abuse against a child to whom the defendant had recurring access and with whom the defendant engaged in three and more acts of lewd and lascivious conduct and with lewd and lascivious conduct upon the same child. Spradling v. State, 310 Ga. App. 337, 715 S.E.2d 672 (2011).

Trial court properly admitted similar transaction evidence during the defendant's trial for aggravated child molestation, aggravated sexual battery, and child molestation because despite the defendant's age at the time, the evidence was relevant to show the defendant's lustful disposition with regard to younger females, the conduct with which the defendant was charged; the trial court properly considered the defendant's youth at the time of the similar transaction, along with the significant age difference between the defendant and the victim, the defendant's attempt to conceal the defendant's behavior by acting in secluded locations, and the nature of the acts the defendant committed before concluding that the evidence was admissible. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

**Admission of similar transaction evidence against adult in child molestation case.**

Trial court did not abuse the court's discretion in admitting the defendant's prior sexual battery conviction during the defendant's trial for child molestation, O.C.G.A. § 16-6-4(a), and aggravated child molestation, § 16-6-4(c), because the prior sexual battery and the molestation of the victim were similar; the defendant pled guilty to the sexual battery, establishing that the defendant had committed the separate offense, and both the prior sexual battery and the molestation involved the defendant's acts of touching the female victims' breasts and occurred within a three-month time frame. Stepho v. State, 312 Ga. App. 495, 718 S.E.2d 852 (2011).

**Evidence of a prior violent act.**

Trial court's determination that the state met the requirements for admission of similar transaction evidence was not an abuse of discretion because evidence that the defendant used violence against an adult with whom the defendant had a close, loving relationship was admissible to show the defendant's bent of mind in using violence against a member of the defendant's family, even though the family member was a mere infant, and even though the family member suffered internal, rather than external, injuries. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789 (2011).

Trial court did not err by admitting evidence of the defendant's prior difficulty in which the defendant squeezed and threw the defendant's baby because the prior difficulty evidence was properly admitted to show the defendant's bent of mind towards and course of conduct with the baby; even if similarity were an issue, both the prior difficulty and the crimes for which the defendant was being tried involved inappropriate squeezing of the baby. Stokes v. State, 289 Ga. 702, 715 S.E.2d 81 (2011).

**Evidence of domestic violence.** — Admission of testimony from the mother of a child molestation victim describing a defendant's incidents of violence toward her was not erroneous admission of character evidence because it explained the mother's three-month delay in reporting the incident. Hernandez v. State, 304 Ga. App. 435, 696 S.E.2d 155 (2010).

**Evidence of incident occurring when defendant was a juvenile.** — Trial court did not err when the court denied the defendant's motion for new

trial on the basis that the state proffered similar transaction evidence of an incident that occurred when the defendant was a juvenile because the trial court did offer to give a curative instruction to the jury, but trial counsel refused the curative instruction citing "strategy" as counsel's reasons; the trial court admonished the witness not to make any references to the juvenile court proceeding. Kitchens v. State, 289 Ga. 242, 710 S.E.2d 551 (2011).

**Evidence of other conduct or crimes was admissible in the following cases.**

Trial court did not err in sentencing the defendant to a $1,000 fine for speeding in violation of O.C.G.A. § 40-6-181(b)(2) because the defendant did not object to the state's failure to admit certified copies of the defendant's prior convictions, nor did the defendant dispute that the defendant had multiple convictions for traffic violations; when the trial court asked the defendant whether any of the defendant's previous violations occurred while the defendant was operating a motorcycle, the defendant implicitly admitted at least one prior conviction for speeding. Jones v. State, 308 Ga. App. 99, 706 S.E.2d 593 (2011).

Trial court did not err in finding that similar transaction evidence was relevant and admissible because the evidence showed that the defendant was involved in the planning and/or execution of each of the similar transactions pursuant to O.C.G.A. § 16-2-20, even if the defendant was not the actual perpetrator of the crime; given that the defendant was identified as an active participant in individual crimes that were part of this continuing criminal enterprise, and that the defendant's possession of a ring stolen from a car salesperson further demonstrated the involvement in the crime spree, the jury was authorized to find that the defendant committed the independent offenses or acts as either an actual perpetrator or as a party to the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

**Evidence of other conduct or crimes was inadmissible in the following cases.**

Trial court did not err when the court declined to exclude a witness's testimony that the defendant told the witness that the defendant wanted to go to a "shot house" so that the defendant could rob the house based on the defendant's objection that the statement was rendered inadmissible by the state's failure to follow the procedural rules appropriate to similar transaction evidence, Ga. Unif. Super. Ct. R. 31.3, because the defendant's statement was neither a crime in and of itself nor a relevant expression of prior difficulties between the defendant and any of the victims of the crimes; an accused's statements were not independent offenses or acts unless those statements in and of themselves constituted a crime, but rather, statements such as the challenged words the witness repeated fell within the definition of character evidence, O.C.G.A. § 24-2-2, which was irrelevant and had to be excluded unless admissible for some other legal purpose. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436 (2011).

### 3. Victim's Character

**Evidence of victim's drug use.**

Trial court did not abuse the court's discretion in granting the state's motion in limine to exclude evidence of the victim's cocaine use under O.C.G.A. § 24-2-2 because the evidence as to effects of the cocaine in the victim's body was merely speculative since there was no evidence about the quantity of cocaine in the victim's system or when the cocaine was ingested; evidence of drug use is inadmissible when the evidence is intended only to impugn a victim's character and has no relevance to any disputed issues in the case. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925 (2011).

**Evidence of victim's violent acts.**

Trial court did not err when the court denied the defendant's ineffective assistance of counsel claim because counsel testified that counsel attempted to produce evidence of specific acts of violence by the victim against third persons but because of lack of time was not able to do so; counsel further testified that counsel did not strenuously pursue a continuance for more time to gather such evidence because of the age of the case and because counsel believed such motion for continu-

ance would be unsuccessful. Rafi v. State, 289 Ga. 716, 715 S.E.2d 113 (2011).

## 24-2-3. (Effective until January 1, 2013) Complainant's past sexual behavior not admissible in prosecutions for certain sex offenses; exception; in camera hearing; court order.

**Cross references.** — Affirmative defense to certain sexual crimes, § 16-3-6.

**Law reviews.** — For annual survey of law on evidence, see 61 Mercer L. Rev. 1113 (2010).

### JUDICIAL DECISIONS

Analysis

General Consideration
Child Molestation
Rape

#### General Consideration

**Evidence of prior false claims properly barred.** — In a sexual molestation case, the trial court did not abuse the court's discretion in concluding that the defendant's evidence that the victim once falsely alleged that another man had molested the victim did not establish by a reasonable probability that the prior allegation was in fact false. Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122 (2011).

#### Child Molestation

**Evidence not admissible.**

Defendant's convictions for child molestation in violation of O.C.G.A. § 16-6-4(a) and sexual battery in violation of O.C.G.A. § 16-6-22.1(b) were vacated because the trial court erred by applying O.C.G.A. § 24-2-3(a) to the case and striking the testimony regarding the victim's previous alleged sexual conduct with the victim's brother based on the court's conclusion that the rape shield statute prohibited the defendant from presenting evidence regarding the victim's prior sexual history, and the error in excluding the evidence of the victim's prior sexual history could have contributed to the jury's verdict since the only direct evidence of the defendant's guilt was the victim's testimony that the defendant sexually abused the victim; O.C.G.A. § 24-2-3, as the statute is currently written, does not apply to prosecutions for child molestation or sexual battery. Robinson v. State, 308 Ga. App. 562, 708 S.E.2d 303 (2011).

**Evidence may be excluded even if the charge is not aggravated molestation.** — Although the rape shield statute, O.C.G.A. § 24-2-3, did not require the exclusion of evidence of a child molestation victim's past boyfriends and difficult past because the charge was not an aggravated charge, the trial court was authorized to evaluate the relevance of any evidence and exclude the evidence on that basis. Cantu v. State, 304 Ga. App. 655, 697 S.E.2d 310 (2010).

**Reference to evidence prohibited by rape shield law did not create manifest necessity for mistrial.**

Child molestation victim was not entitled to a new trial based on the victim's testimony that she was a virgin prior to his first assault of her. Even assuming that the testimony violated the rape shield statute, O.C.G.A. § 24-2-3(a), the challenged testimony was cumulative of other testimony to which defendant did not object. Collins v. State, 310 Ga. App. 613, 714 S.E.2d 249 (2011).

**Evidence of victim's sexual activity improperly excluded.** — Trial court abused the court's discretion in excluding evidence that a child molestation victim had been having sex with her boyfriend because the evidence would provide an alternate explanation as to why the vic-

tim's hymen had been penetrated, and absent the evidence of the sexual relationship with the boyfriend, the obvious inference was that the defendant had caused the penetration injuries; the state decided to present evidence of the penetration damage to the victim's hymen, and it was the state's affirmative act of "opening the door" to the area that required the trial court to allow the defendant to present evidence that someone other than the defendant caused the injury. Tidwell v. State, 306 Ga. App. 307, 701 S.E.2d 920 (2010).

**Evidence of child victim's alleged viewing of pornography.**

In the absence of a showing of relevance, evidence of a sexual molestation victim's exposure to sexually explicit photographs or sexually explicit conversation was wholly irrelevant to the issue of whether the defendant committed the acts alleged by the victim, and was thus properly excluded by the trial court pursuant to O.C.G.A. § 24-2-3(a). Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122 (2011).

### Rape

**Evidence not admissible in rape case.**

Trial court did not abuse the court's discretion in excluding the defendant's testimony regarding statements the victim allegedly made to the defendant because the statements were prohibited by the Rape Shield Statute, O.C.G.A. § 24-2-3(a), since the statements made reference to the victim's past sexual behavior by implying that the victim had sex in the past with her boyfriend and with older men; the defendant would not have reasonably believed that the victim consented to sex because there was testimony that the victim was intoxicated, in and out of consciousness, and unable to move. Turner v. State, 312 Ga. App. 315, 718 S.E.2d 545 (2011).

Trial court did not err in refusing to allow the defendant to cross-examine his daughter, the victim's friend, about a comment she posted on a website concerning the victim because the testimony the defendant sought to elicit, that the victim had sex with other men, was the very type of evidence prohibited by the Rape Shield Statute, O.C.G.A. § 24-2-3(a). Turner v. State, 312 Ga. App. 315, 718 S.E.2d 545 (2011).

**Inquiring about areas of victim fabrication.**

Trial court did not abuse the court's discretion by excluding cross-examination and testimony concerning a 15-year-old rape victim's alleged past sexual encounters under the Rape Shield Statute, O.C.G.A. § 24-2-3, despite the defendants' claims that the victim fabricated her story in retaliation for the defendant telling her mother that she was sexually active. McIntyre v. State, 311 Ga. App. 173, 715 S.E.2d 431 (2011).

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# CHAPTER 3

# HEARSAY

## ARTICLE 1

## GENERAL PROVISIONS

### 24-3-1. (Effective until January 1, 2013) Hearsay evidence defined; when admitted.

**Law reviews.** — For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010).

## JUDICIAL DECISIONS

Analysis



### General Consideration

**Any error in admitting a hearsay statement was harmless, etc.**

Assuming that the trial court erred in excluding a witness's testimony that the witness observed an interaction between the defendant and the victim's mother, there was no ground for reversal because any such error was harmless; aside from the fact that the meaning of the mother's response was unclear, other evidence was presented that on a prior occasion the mother had harmed the victim. Amador v. State, 310 Ga. App. 280, 713 S.E.2d 423 (2011).

### Applicability

**Erroneous hearsay ruling did not warrant reversal.** — Superior court did not err in confirming the nonjudicial foreclosure sale because the court's erroneous hearsay ruling was not harmful and did not warrant reversal; the ruling did not deprive a construction company and guarantors of an evidentiary basis to support their challenge to the regularity of the sale, and the superior court had a sufficient record to consider their argument and find that the sale was regular. Diplomat Constr., Inc. v. State Bank of Tex., No. A11A1836, 2012 Ga. App. LEXIS 297 (Mar. 19, 2012).

### Application and Examples

#### 1. Admissible Hearsay

**Admission of necessity.**

Testimony by a friend of the decedent that, before the death of the decedent, the decedent had told the friend that the decedent had been beaten in a fight by the defendant was admissible evidence under the necessity exception to the hearsay rule. The statements by the decedent were made to a friend (not an agent of law enforcement) in seeking help with an ongoing emergency and preventing immediate harm to the decedent. Miller v. State, 289 Ga. 854, 717 S.E.2d 179 (2011).

#### 2. Hearsay Not Found

**Evidence not offered to prove truth of matter asserted.**

Probate court did not abuse the court's discretion by admitting double hearsay from a witness who, when asked what the testator told the witness that the propounder had said about the caveator, responded, "that the caveator had taken his money and went to Florida and was not coming back" because the second level of alleged hearsay, what the propounder said to the testator about the caveator, was not hearsay, since it was not introduced for the truth of the matter asserted but rather for the effect it had on the testator; the caveator's theory of the case was that the statement by the propounder to the testator was not true, and the evidence was introduced to show where the testator got the misinformation. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011).

**Debtor's opinion testimony as to value.** — Debtor's testimony, standing alone, was insufficient under O.C.G.A. § 24-9-66 to establish the fair and reasonable value of the debtor's car at the time the car was repossessed because the trial court was authorized to conclude that the debtor's "opinion" testimony about the

value of the car two years earlier was based entirely upon hearsay and that, absent any evidence to show that the hearsay was reliable, the debtor failed to demonstrate a sufficient foundation for the debtor's conclusions; the debtor had no education or experience in the value of vehicles and the debtor presented no evidence of the price the debtor paid for the car, the condition of the car at the time the car was repossessed, the potential market for such cars, or other relevant factors to be considered in reaching a conclusion about the car's value. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

**Prior consistent statement.**

Admission of an investigator's summary of a victim's prior consistent statement was not reversible error because the record contained other unchallenged testimony by witnesses other than the victim conveying the content of the victim's prior statement and that the victim's prior statement was consistent with the victim's trial testimony; it was not likely that the subsequent admission of the victim's statement itself contributed to the guilty verdict, and by the time the statement was read, any bolstering effect of the repetitive nature of the prior statement had occurred without objection. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Trial court did not err by admitting prior consistent statements of the victim and the defendant's son in videotaped interviews that also included comments by the interviewer because nothing in the record demonstrated that the portion of the videotape that the trial court ruled would not be presented for the jury was played for the jury, and the defendant's counsel made no objection after the videotape was played. Wade v. State, 305 Ga. App. 382, 700 S.E.2d 827 (2010), cert. denied, U.S. , 131 S. Ct. 3066, 180 L. Ed. 2d 893 (2011).

**Testimony concerning surveillance videotape.** — To the extent that In re C.G., 261 Ga. App. 814 (2003) finds that a surveillance videotape merely depicting nonverbal conduct constitutes a hearsay statement, it is hereby disapproved. Hammock v. State, 311 Ga. App. 344, 715 S.E.2d 709 (2011).

Testimony concerning a surveillance videotape was not hearsay because the witnesses did not offer any testimony about what someone else said or wrote outside of court, but rather, the witnesses testified about the witnesses' personal observations of the conduct that appeared on the videotape; because the testimony did not ask the jury to assume the truth of out-of-court statements made by others, and instead, the value of the testimony rested on the witnesses' own veracity and competence, the testimony was not hearsay. Hammock v. State, 311 Ga. App. 344, 715 S.E.2d 709 (2011).

### 3. Contents of Books and Records

**Drug test results should not have been admitting at an administrative hearing before a county personnel board,** which was reviewing a firefighter's termination, because the lab results were hearsay; other than the lab report, there was no factual basis for the medical review officer's testimony that the firefighter tested positive for marijuana. Neal v. Augusta-Richmond County Pers. Bd., 304 Ga. App. 115, 695 S.E.2d 318, cert. denied, No. S10C1546, 2010 Ga. LEXIS 753 (Ga. 2010).

**Expert opinion based upon manual that was not part of the record.** — Although an expert witness stated in an affidavit that according to the State Forestry Commission Policy and Procedure Manual, no active flames were permitted outside of the permitted time, the manual upon which the expert relied for that conclusion was not a part of the record and, thus, the expert's assertion regarding the manual's contents was inadmissible hearsay and without probative value. Morgan v. Horton, 308 Ga. App. 192, 707 S.E.2d 144 (2011), cert. denied, No. S11C1028, 2011 Ga. LEXIS 533 (Ga. 2011).

**Condominium declarations were hearsay.** — Condominium declarations which were submitted by a condominium unit neighbor in an action against another condominium unit owner were hearsay under O.C.G.A. § 24-3-1(a). However, the neighbor did not present admissible evidence of the heightened duty of care allegedly imposed by the declarations so that

duty, therefore, could not be considered on summary judgment under O.C.G.A. § 24-3-14(b). Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96 (2011).

### 4. Conversations

**Statement in an affidavit.**

Statements and actions of a manufacturer's representative did not preclude summary judgment in favor of the manufacturer in a driver's products liability action because the driver's affidavit testimony regarding the representative's statements was hearsay; there was no merit in the driver's contention that the representative's offer to replace a tire was evidence of a defect. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

**Employee overhearing coworker's telephone conversation.** — Hearsay testimony of a bank employee as to another employee's telephone conversation was admissible under O.C.G.A. §§ 24-3-1(b) and 24-3-3 as part of the res gestae of the other employee's conversation. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

### 5. Criminal Cases

**Testimony of officer.**

Admission of the arresting officer's testimony that a female witness to the shooting provided a description of a person of interest and that as a result of that description, the defendant was identified and taken into custody was harmless since the alleged hearsay pertained to the shooting incident, but all of the charges relating to that incident either were dismissed or resulted in an acquittal; under the circumstances, it was highly probable that the admission of the testimony did not contribute to the verdict. Davis v. State, 304 Ga. App. 355, 696 S.E.2d 381 (2010).

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984 was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

Trial court erred in convicting the defendant of selling cocaine within 1,000 feet of a housing project because there was no probative evidence that the cocaine sale took place within 1,000 feet of a public housing project property as required by O.C.G.A. § 16-13-32.5(b) since the prosecution did not rely on the authorized method under § 16-13-32.5(e) of using a map to establish that the cocaine sale occurred within 1,000 feet of a public housing project but relied on the testimony of the state's witnesses to prove the public housing element of the offense; the only evidence that the apartment complex where the sale took place was occupied by low and moderate-income families was the testimony of an officer who was a member of the narcotics task force involved in the defendant's arrest, but the officer admitted on cross-examination that the officer only knew that because that was what the officer had been told. Quarterman v. State, 305 Ga. App. 686, 700 S.E.2d 674 (2010).

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defendant out of a photographic lineup. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010).

Trial court did not err in admitting a detective's testimony that during the detective's investigation into the crimes, the detective spoke with the defendant's co-indictee and answered affirmatively when the prosecutor asked if the detective

obtained an arrest warrant for the defendant because the detective did not testify to what the co-indictee said or any other person related to the detective during the investigation; it was not apparent that the co-indictee was the only source for the information the detective used when obtaining the arrest warrant, but to the contrary, the jury heard evidence that the detective, before obtaining the warrant, had talked with other witnesses and also with other officers investigating the crimes. Newsome v. State, 288 Ga. 647, 706 S.E.2d 436 (2011).

Trial court's error in allowing a detective to testify as to what a police officer told the detective was harmless because the evidence was cumulative of the officer's own testimony. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011).

Any error in the admission of the testimony of a sheriff's deputy regarding a conversation that the deputy had with the known drug user, wherein the known drug user said that the defendant was bringing the drug user drugs, was harmless given the overwhelming evidence that the defendant possessed cocaine with the intent to distribute the cocaine and did not require reversal. Moore v. State, 310 Ga. App. 106, 712 S.E.2d 126 (2011).

Although the trial court improperly allowed the hearsay testimony of an officer, the admission was harmless because there was overwhelming direct and circumstantial evidence against the defendant. Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

Trial counsel did not provide ineffective assistance by failing to object to a police officer's hearsay testimony regarding a convenience store clerk's identification of the defendant because the clerk testified at trial and, thus, the clerk's prior out-of-court statements were not hearsay under O.C.G.A. § 24-3-1; the defendant failed to show that prejudice due to the testimony in light of the fact that it was merely cumulative of the clerk's testimony. Anderson v. State, 311 Ga. App. 732, 716 S.E.2d 813 (2011).

Evidence was insufficient to support the defendant's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21(a)(2) because there was no affirmative evidence that a restaurant employee saw the defendant with a gun or heard the defendant's threats to shoot; from an officer's description of the scene, the officer did not personally observe the employee climb out of the drive-through window, and thus, the evidence that the employee climbed out of the window rested mainly on the veracity and competence of persons other than the testifying officer, making it hearsay under O.C.G.A. § 24-3-1(a). Santiago v. State, 314 Ga. App. 623, 724 S.E.2d 793 (2012).

Trial counsel was not ineffective for failing to object as hearsay to a police officer's testimony because the defendant failed to show that there was a reasonable probability that the outcome of the trial would have been different had trial counsel objected to the testimony; the evidence that the defendant committed armed robbery was overwhelming. Santiago v. State, 314 Ga. App. 623, 724 S.E.2d 793 (2012).

**Testimony of officer regarding information heard over police radio.** — Officer's testimony as to what the officer heard over the police radio with regard to another officer spotting the defendant in a parking lot was not hearsay because the second officer testified at trial and was subject to cross-examination. The defendant's counsel was therefore not ineffective in failing to object to this testimony. Veasey v. State, 311 Ga. App. 762, 717 S.E.2d 284 (2011).

**Testimony of officer inadmissible hearsay.** — Trial court did not err in denying the defendant's motion to suppress evidence obtained during a roadblock because the evidence was sufficient to show that the decision to implement the roadblock was made by a supervisory officer, which prevented the field officers from exercising unfettered discretion in stopping the drivers; although the screening officer pointed to a corporal's testimony reflecting that the internal policy of the county sheriff's office required that the roadblock's "written action plan" be approved by the major of field operations, the major did not testify at the hearing, and the corporal's testimony that the plan had been approved by the major was inadmissible hearsay. Rappley v. State, 306 Ga. App. 531, 702 S.E.2d 763 (2010).

**Testimony of DFCS worker regarding defendant's other acts of molestation.** — Although an investigator's statement that a defendant had sex with the victim's friends was double hearsay under O.C.G.A. § 24-3-1(a), the remark was fleeting and unsolicited, and because there was properly admitted evidence that the defendant molested one of the victim's friends, the remark not prejudicial. Collins v. State, 310 Ga. App. 613, 714 S.E.2d 249 (2011).

**Security guard's testimony admissible.** — Store security guard's testimony was not based on hearsay because the guard did not testify based on the guard's review of a video recording that showed a juvenile concealing merchandise in the juvenile's pants, but testified, based on the guard's observation, via closed-circuit television, of the event as the event happened. In the Interest of J. C., 308 Ga. App. 336, 708 S.E.2d 1 (2011).

**Testimony of absent victim.**

Trial court did not abuse the court's discretion in admitting testimony of the victim's cousin regarding the victim's statement that the defendant had "jumped him" because the victim's statement satisfied all three prerequisites for the admission of hearsay under the necessity exception, O.C.G.A. § 24-3-1(b); the victim had been murdered and was not available, the statements had the appropriate indicia of trustworthiness because the statements were made when the victim was confiding in the victim's cousin, whom the victim had known all the victim's life and had lived with for some time, and the victim's statement was highly probative of the combative nature of the victim's relationship with the defendant. Evans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011).

Trial court did not abuse the court's discretion by holding that the testimony of the victim's friend regarding the victim's statements bore sufficient indicia of trustworthiness to be admissible under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), because the victim was deceased and unavailable to testify, and the statements were relevant to show the defendant's intent, motive, and bent of mind and were more probative of the facts than other evidence that could be procured and offered; the friend and the victim were close personal friends who frequently worked together and regularly confided in each other about personal matters including the fact that the victim was involved in an extra-marital affair. Gibson v. State, 290 Ga. 6, 717 S.E.2d 447 (2011).

Trial court did not abuse the court's discretion by concluding that the witnesses' testimony regarding statements the victim made about a relationship with the defendant bore sufficient indicia of trustworthiness to be admissible under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), because the victim was deceased and unavailable to testify, the statements were relevant to show defendant's intent, motive, and bent of mind, and the statements were more probative of the facts than other evidence that could be procured and offered; both witnesses stated that the witnesses discussed personal and confidential matters with the victim. Butler v. State, 290 Ga. 425, 721 S.E.2d 889 (2012).

Assuming that the trial court erred by admitting into evidence under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), the testimony of a witness regarding statements the victim made to the witness, the error was harmless because other admissible evidence, including defendant's own statements to others, covered the same subject matter as the statements the victim made to the witness. Williams v. State, 290 Ga. 418, 721 S.E.2d 883 (2012).

**Testimony as to statements of third persons.**

Trial court did not err in refusing to allow the defendant to cross-examine the victim's grandmother about statements the victim's mother made about her intent to report an incident of child molestation or about the grandmother's thoughts and interactions with the victim that caused her to question the victim's credibility because the statements constituted inadmissible hearsay, and the grandmother could not testify to specific instances of bad conduct exhibited by the victim; the defendant did not show how the defendant was harmed by the exclusion of the evi-

dence because if the jury wished to find that the victim was not credible, there was ample evidence upon which the jury could have based that finding, but the jury chose to believe the victim's version of the events, which the jury was authorized to do. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205 (2011).

Defendant could not establish that the trial court's admission of a witness's testimony would have constituted an abuse of discretion had trial counsel voiced an objection because the evidence was admissible under the necessity exception to the hearsay rule, subject to the trial court's discretion; the witness testified that the victim had stated that the victim had been threatened. White v. State, 289 Ga. 511, 712 S.E.2d 834 (2011).

Any claim of error as to the admissibility of the testimony of the victim's coworker under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), that the defendant had been harassing and stalking the victim was waived for purposes of appeal because defense counsel acquiesced in the curative instruction that the defendant was on trial for the charges contained in the indictment only, and the jury could not consider allegations of any other crimes because it was introduced without any hearsay objections from the defendant. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012).

**Language conduit rule.**

Trial court did not err in allowing an arson investigator, who was present when a police officer interviewed the defendant in Spanish, to testify as to what the officer told the investigator in English that the defendant said to the officer in Spanish because the officer personally testified to the interview with the defendant, and defense counsel, who did speak Spanish, had the opportunity to question the officer closely as to the officer's translation of the defendant's statements; therefore, there was no violation of the confrontation clause, and the defendant could show no harm as a result of the claimed error. Ursulita v. State, 307 Ga. App. 735, 706 S.E.2d 123 (2011).

**Statements of confidential informant.**

Lead investigator's references to a tip the investigator had received from an unnamed source implicating the defendant in the shooting did not violate the hearsay rule, O.C.G.A. § 24-3-1, or the Confrontation Clause because most of the instances in which the investigator made mention of the tip did not involve recitation of any "statement" made by the tipster but rather merely referred to unspecified "information" that the investigator had come to possess with regard to the case or simply acknowledged that an unnamed source existed; any error in the admission of the investigator's testimony as to the substance of the tipster's actual statement was harmless because one of the statements was merely cumulative of the much more detailed testimony of the victim affirmatively identifying the defendant as the shooter, and the second of the statements related not to the evidence against the defendant but rather to the strength of the case against another. Johnson v. State, 289 Ga. 22, 709 S.E.2d 217 (2011).

**Statement from girlfriend should not have been admitted.** — Trial counsel was ineffective because counsel did not properly object to evidence that the defendant was a drug trafficker who always carried a gun, that the defendant was a dangerous man, that the defendant was the shooter in a similar transaction, and that the defendant's other girlfriend knew where the gun was located after the second crime; the statements, especially that the defendant's other girlfriend knew where the gun was located, were clearly objectionable hearsay, and failing to object to that statement alone was deficient because the statement linked the defendant to the principal crime. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

**Victim's statement to parent and forensic interviewer admissible.** — Trial court did not err in admitting hearsay statements made by a 15-year-old child molestation victim to the victim's parent and to the forensic interviewer because the victim testified at trial and was available for cross-examination. Tidwell v. State, 306 Ga. App. 307, 701 S.E.2d 920 (2010).

**Statement to show defendant's motive.**

Witness's testimony that the witness

heard someone say to the defendant that "we beat the victim up before and we'll do it again," to which the defendant said "yeah," was admissible because the defendant, by the response, adopted as the defendant's own the statement that "we" beat up the victim and would do so again. Cawthon v. State, 289 Ga. 507, 713 S.E.2d 388 (2011).

**Admission of phone call as part of res gestae.** — Trial court did not err in admitting the victim's testimony regarding a telephone call the victim received from the defendant's accomplice because the testimony was part of the res gestae since the phone call explained the victim's dispute with the accomplice, which occurred immediately before and led directly to the confrontation and assaults. Gaither v. State, 312 Ga. App. 53, 717 S.E.2d 654 (2011), cert. denied, No. S12C0337, 2012 Ga. LEXIS 216 (Ga. 2012).

**Testimony as to observations.** — There was no hearsay in a witness's testimony that the witness saw the victim with bruises on the victim's face because the witness testified as to the witness's observations; what the witness related regarding the victim "laughing it off" was not hearsay because the statement was not offered in order to establish the truth of the matter asserted therein, thus resting for the statement's value upon the credibility of the out-of-court asserter. Cawthon v. State, 289 Ga. 507, 713 S.E.2d 388 (2011).

**Evidence admissible under necessity exception.**

Trial court did not abuse the court's discretion in admitting out-of-court statements a victim made to the victim's sister under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), because the specific indicia of reliability did not have to be established by the testifying witness alone, and in the defendant's own testimony, the defendant described the relationship between the victim and the victim's sister as "real close;" even if the trial court did err, the error was harmless because the other evidence of the defendant's guilt was overwhelming and was corroborated by the defendant's own testimony, so it was highly probable that any error did not contribute to the verdict. Mills v. State, 287 Ga. 828, 700 S.E.2d 544 (2010).

Trial court did not err by allowing the victim's parent to testify that the victim told the parent a few days before the victim died that the victim was going to go to the defendant's house in a few days because the evidence was properly admitted under the necessity exception to the rule against hearsay; because the victim was deceased, the victim was unavailable to testify, and the testimony offered was relevant to explain the state of feelings between the defendant and the victim and when and why the victim would have been at the defendant's apartment, which was where the victim's body was found. Jennings v. State, 288 Ga. 120, 702 S.E.2d 151 (2010).

Trial court did not err in admitting statements the defendant made to the defendant's spouse under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), because the court properly concluded that the defendant and the defendant's spouse maintained a confidential relationship and that the out-of-court statements were trustworthy, and the statements were relevant to show the defendant's bent of mind on the day the defendant shot the victim; although the defendant's spouse moved to California where the spouse lived with the spouse's parents, the defendant and the defendant's spouse continued to speak to each other regularly by telephone, and they spoke several times on the day in question. Herrera v. State, 288 Ga. 231, 702 S.E.2d 854 (2010).

Trial court did not err in admitting the testimony of the victim's roommate under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), because the confidential nature of their relationship, coupled with the roommate's identification of bruises the victim sustained at the time of the beating, were sufficient to attribute veracity to the hearsay declarations. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012).

Any claim as to the admissibility of a witness's testimony under the necessity exception to the hearsay rule, O.C.G.A. § 24-3-1(b), was waived because while a

pretrial motion in limine sought to exclude the testimony on hearsay grounds, it was agreed that counsel would renew any objection counsel had to the witness' testimony at trial, and the defendant did not timely object at trial; the untimely motion for mistrial was based on improper character evidence, not on hearsay grounds as asserted on appeal. Jeffers v. State, 290 Ga. 311, 721 S.E.2d 86 (2012).

**Capital cases.** — When petitioner was sentenced to death, remand was warranted as to petitioner's ineffective assistance claim because a proper analysis of prejudice would have taken into account newly uncovered evidence of petitioner's "significant" mental and psychological impairments; the fact that some of such evidence may have been "hearsay" did not necessarily undermine its value — or its admissibility — for penalty phase purposes. Sears v. Upton, No. 09-8854, 2010 U.S. LEXIS 5540 (2010).

**Testimony regarding observation of video surveillance recording not hearsay.** — Trial court did not abuse the court's discretion in allowing a store manager to testify regarding the manager's observation of the store's video-surveillance-system recording, which showed the defendant just before the defendant entered the store, because the testimony was not hearsay since it did not ask the jury to assume the truth of out-of-court statements made by others, and instead the value of the testimony rested on the store manager's own veracity and competence; the store manager did not testify about what another person said or wrote outside of court, but rather, the store manager testified as to the manager's personal observations of the defendant's conduct that appeared on the video-surveillance-system recording. McClain v. State, 311 Ga. App. 750, 716 S.E.2d 829 (2011).

**No reversible error in criminal case when defendant failed to show harm.** — Assuming that it was error to admit contested hearsay testimony, it was not reversible error because the defendant had to establish harm for the error to be reversible, and despite having had an opportunity to shoulder that burden at the hearing on the motion for new trial, the defendant failed to do so. Glenn v. State, 288 Ga. 462, 704 S.E.2d 794 (2010).

### 6. Deceased Persons

**Statement of deceased declarant not hearsay.** — To the extent that the statement of an employer's co-owner that an employee's father told the co-owner that the father had "put a call in and was waiting to hear back" from an insurer was considered for the limited purpose to prove that the insurer had notice of the occurrence, the statement did not constitute inadmissible hearsay because the father, the declarant, was deceased. Hoover v. Maxum Indem. Co., 310 Ga. App. 291, 712 S.E.2d 661 (2011).

**State-of-mind exception applied.** — Probate court did not abuse the court's discretion by admitting double hearsay from a witness who, when asked what the testator told the witness that the propounder had said about the caveator, responded, "that the caveator had taken his money and went to Florida and was not coming back" because the first level of hearsay, what the testator said to the witness, was admissible under the state-of-mind exception to the hearsay rule. McDaniel v. McDaniel, 288 Ga. 711, 707 S.E.2d 60 (2011).

### 12. Hearsay Found

**Investigating officer's statement inadmissible.**

In a juvenile's adjudication as delinquent for theft by taking the juvenile's sister's car, although the juvenile admitted taking the car, the state failed to prove venue and failed to prove that the taking was unlawful as required by O.C.G.A. § 16-8-2. The officer's testimony that the sister said the taking was without the sister's permission was inadmissible hearsay and was insufficient to support the adjudication even though the evidence was admitted without objection. In the Interest of E.C., 311 Ga. App. 549, 716 S.E.2d 601 (2011).

**Detective's statement meant to bolster witness testimony.**

Trial court erred in overruling the defendant's hearsay objection because an officer's testimony about what the victim's motel neighbor said to the officer, which

came before that witness took the stand, was not a prior consistent statement but was hearsay; however, the error was harmless because any improper bolstering of the victim's neighbor's testimony by the officer's hearsay testimony had no real effect on the defendant's convictions since the victim's neighbor did testify, and that testimony repeated and expanded on the prior statements the officer had recounted. Johnson v. State, 289 Ga. 498, 713 S.E.2d 376 (2011).

**Contract issues.**

Trial court did not err in granting a homeowners' association summary judgment on a resident's promissory estoppel claim because the resident failed to come forward with any evidence creating an issue of fact on the resident's claim; the resident stated that a member of the association promised the resident that the association would store the resident's airboat but that claim rested on statements allegedly made to the resident by the member, which were hearsay. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Trial court did not err in granting a homeowners' association summary judgment on a resident's breach of contract claim because the resident failed to show the elements of an enforceable contract pursuant to O.C.G.A. § 13-3-1; any oral contract between the resident and a member of the association depended upon the statements of the member, who was not deposed and did not offer any affidavit, those statements, therefore, were hearsay proving nothing for the purposes of summary judgment. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Trial court erred by granting a creditor summary judgment in the creditor's action against a debtor to recover the balance due on a credit card account because the actual amount due the creditor was not sufficiently proved; an employee's statement in an affidavit that the creditor's predecessor indicated to the creditor that the balance was $10,029 was not sufficient to show the actual balance due the creditor because the statement was mere hearsay under O.C.G.A. § 24-3-1(a) and not subject to an exception, and the employee's statement that it was the creditor's understanding from its attorney that no payments had been made since the account was turned over and the principal sum of $10,029 was due was also inadmissible because such hearsay had no probative value whatsoever. Jackson v. Cavalry Portfolio Services, LLC, 314 Ga. App. 175, 723 S.E.2d 475 (2012).

**Double hearsay inadmissible in property action.** — Trial court did not err in granting a property owner's motion in limine to exclude evidence that a father of a record title holder's descendant told the descendant that the father told the owner's brother that the brother could not build a house on property because the evidence was double hearsay and inadmissible. DeFoor v. DeFoor, 290 Ga. 540, 722 S.E.2d 697 (2012).

## RESEARCH REFERENCES

**ALR.** — Construction and application of uniform rule of evidence 803(17), providing hearsay exception for market reports, and commercial publications, 54 ALR6th 593.

## 24-3-2. (Effective until January 1, 2013) Original evidence distinguished.

### JUDICIAL DECISIONS

Analysis

Motive
Admissibility
1. In General

### Motive

**State of mind.** — Trial court's exclusion of evidence of a defendant's state of mind when defendant shot a victim was error under O.C.G.A. § 24-3-2, which was harmful in the defendant's criminal trial; the evidence was not hearsay, and was relevant to show the reasonableness of the defendant's state of mind for supporting a justification defense under O.C.G.A. § 16-3-21. Hodges v. State, 311 Ga. App. 46, 714 S.E.2d 717 (2011).

### Admissibility

#### 1. In General

**Testimony admissible to explain conduct.**

In a sexual molestation case, testimony that the victim's grandmother had learned in the past that the victim's aunt had been sexually molested was not hearsay since the testimony was not used to establish the truth of the matter asserted, that the aunt had been sexually molested, but was offered to show that the grandmother had a history of tolerating the sexual abuse of young children. Walker v. State, 308 Ga. App. 176, 707 S.E.2d 122 (2011).

### Application and Examples

#### 15. Testimony of Law Enforcement Officers

**Explaining conduct of officer admissible.**

Trial court did not err in admitting the testimony of a detective that two men who were present at the crime scene stated that the men would not come to court because the statements were admissible under O.C.G.A. § 24-3-2 to explain that the men's lack of cooperation was the reason that the detective did not obtain further assistance from the men in the detective's investigation; the statements tended to explain the detective's conduct, which the defendant had called into question, and even if the testimony was characterized as hearsay, the testimony was merely cumulative of the other evidence of the men's uncooperative attitude. Reeves v. State, 288 Ga. 545, 705 S.E.2d 159 (2011).

Although a detective's testimony could have been better focused to address the relevant issue without mentioning out-of-court statements, the trial court did not commit reversible error in permitting the testimony under O.C.G.A. § 24-3-2 because the disputed testimony was not an effort to sneak hearsay information damaging to the defendant into the trial under the guise of explaining investigative conduct since three eyewitnesses told the jury directly that the shooter was wearing an orange shirt; the officer's conduct in searching for, but failing to find, a person wearing an orange shirt at the crime scene was relevant, because it corroborated the testimony of other witnesses that the defendant had been wearing an orange shirt that night but had a friend give the defendant a striped shirt to wear after the shooting to avoid detection. Jones v. State, 290 Ga. 576, 722 S.E.2d 853 (2012).

**Testimony of officers offered to establish basis for action in investigation.** — Testimony of the police officers regarding a witness's statements to police about being beaten up did not constitute inadmissible hearsay, but rather was offered to establish a basis for the officers' actions when investigating who had beaten the witness. Alvarez v. State, 312 Ga. App. 552, 718 S.E.2d 884 (2011).

**Evidence that the officer was led to defendant by speaking with others.** — Investigating officer testifying about a prior similar incident in a defendant's trial for attempted armed robbery was properly permitted to testify that the officer went to talk to the defendant after having spoken with other persons in the defendant's investigation pursuant to O.C.G.A. § 24-3-2. Dennard v. State, 313 Ga. App. 419, 721 S.E.2d 610 (2011).

#### 16. Examples Not Within Rule

**Evidence of a death threat against a defendant.** — Exception under

O.C.G.A. § 24-3-2 may allow evidence of a death threat against a defendant when the evidence is offered not for the truth of the matter asserted but rather to show the victim's state of mind. However, such evidence is admissible only in the circumstances in which there is a conflict in the evidence as to who instigated a fight, to corroborate evidence of communicated threats, or to establish the attitude of the deceased. Render v. State, 288 Ga. 420, 704 S.E.2d 767 (2011).

## 24-3-3. (Effective until January 1, 2013) When declarations part of res gestae.

### JUDICIAL DECISIONS

Analysis



#### General Consideration

**Cited** in Philpot v. State, 309 Ga. App. 196, 709 S.E.2d 831 (2011).

#### Application and Examples

#### 6. Criminal Law — Defendants

**Statements by defendants held admissible as res gestae in the following cases.**

Although a police car video of a defendant's traffic stop had poor audio quality resulting in inaudible portions, defendant's admissions that defendant's license was suspended were admissible as part of the res gestae pursuant to O.C.G.A. § 24-3-3. The defendant could attack the weight and credibility of the recording, but not the recording's admissibility. Steed v. State, 309 Ga. App. 546, 710 S.E.2d 696 (2011).

**No independent ground for admission of previous conviction.** — No independent ground pursuant to the res gestae evidence rule of O.C.G.A. § 24-3-3 authorized the introduction of evidence that defendant was previously convicted of aggravated assault when defendant did not testify. Furthermore, the statements regarding defendant's criminal record were inherently prejudicial, and, as a result of the statement's admission, defendant's convictions had to be reversed. Pelowski v. State, 306 Ga. App. 41, 701 S.E.2d 529 (2010).

#### 7. Criminal Law — Investigating Officers

**Statement by victim to officer minutes after crime.**

Trial court did not err in overruling hearsay objections the defendant made during testimony from the responding police officer regarding statements the victim made to the officer during the preliminary investigation because the statements were admissible as part of the res gestae of the crime; because the officer testified that the victim was upset and had blood on the victim's face when the officer arrived and made the statements regarding the incident shortly thereafter, the statements were relevant and made without premeditation and were admissible as part of the res gestae. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

#### 8. Criminal Law — Other Crimes

**Other crimes evidence admissible as part of res gestae.** — In a prosecution for felony forgery, a witness's testimony that, just prior to the charged offense, the defendant had tried to induce the witness to cash forged checks and that the witness saw the defendant use an accomplice to

cash forged checks, was properly admitted as res gestae evidence because the testimony showed the planning process for the forgeries in question. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

### 9. Criminal Law — Victims

**Statements within minutes of crime.**

Trial court did not err in admitting an investigating officer's testimony regarding the victim's prior consistent statement identifying the defendant as the victim's attacker despite the defendant's hearsay objection. The victim's statement was made within minutes of the violent assault and while the victim was still suffering its effects; therefore, the victim's statement was admissible as part of the res gestae of the event under O.C.G.A. § 24-3-3. Mims v. State, 314 Ga. App. 170, 723 S.E.2d 486 (2012).

**Statement shortly after crime occurred.**

Trial court did not err in admitting into evidence statements the victim made to an officer that the defendant shot the victim because the statements were properly admitted under the res gestae exception to the hearsay rule, O.C.G.A. § 24-3-3; the victim made the statements shortly after a shooting, in the midst of the chaos of the crime scene, and while awaiting emergency treatment. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

**Earlier incident involving other victims was admissible.** — In an aggravated battery and criminal gang violence case that took place outside an amusement park, evidence of an earlier incident involving the gang inside the park was admissible as part of the res gestae of the crime under O.C.G.A. § 24-3-3 because the same people were involved and the beatings arose from a motive of revenge for the earlier incident. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504 (2011).

**Audiotape of 9-1-1 calls.**

Trial court correctly admitted a 9-1-1 recording as part of the res gestae pursuant to O.C.G.A. § 24-3-3 because the caller identified the defendant while or soon after the incident occurred in an attempt to secure police assistance and was still on the phone with the 9-1-1 operator when the police arrived. Landaverde v. State, 305 Ga. App. 488, 699 S.E.2d 816 (2010).

### 11. Employees

**Employee's statement held admissible.**

Hearsay testimony of a bank employee as to another employee's telephone conversation was admissible under O.C.G.A. §§ 24-3-1(b) and 24-3-3 as part of the res gestae of the other employee's conversation. Goldsmith v. Peterson, 307 Ga. App. 26, 703 S.E.2d 694 (2010).

## 24-3-4. (Effective until January 1, 2013) Statements made for medical diagnosis or treatment.

**Law reviews.** — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

### JUDICIAL DECISIONS

**Testimony pertinent to diagnosis and treatment of victim.**

Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. This evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the defendant's aggravated assault convictions. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439 (2010).

**Nurse practitioner's testimony, etc.**

Trial court did not err in sustaining the state's hearsay objection to a nurse's testimony regarding whether a doctor's medical report reflected that a victim had made an inconsistent statement because the defendant failed to show reversible error by the record since the medical report was not introduced for inclusion in the appellate record, and thus, the court of appeals had no means of determining whether the alleged impeachment evidence actually existed; any error in the exclusion of the evidence was harmless because the evidence would have been cumulative of the trial testimony that had already been admitted. Bearfield v. State, 305 Ga. App. 37, 699 S.E.2d 363 (2010).

## 24-3-5. (Effective until January 1, 2013) Declarations of conspirators.

**Law reviews.** — For annual survey of law on evidence, see 62 Mercer L. Rev. 125 (2010).

### JUDICIAL DECISIONS

Analysis



#### General Consideration

**Cited** in Westmoreland v. State, 287 Ga. 688, 699 S.E.2d 13 (2010).

#### Application

**Declarations of coconspirator admissible.**

Trial court did not abuse the court's discretion in denying the defendant's motion to sever because there was no danger of confusion when only two defendants were on trial in connection with the same occurrence, and there was no evidence admissible against the defendant that was not admissible against the codefendant; the fact that the codefendant elicited a witness's testimony concerning a coconspirator's out-of-court declarations as coconspirator did not show prejudice, and the witness's testimony was admissible under O.C.G.A. § 24-3-5. White v. State, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

Trial court did not err in admitting a witness's testimony as to out-of-court declarations by a coconspirator under the exception to the hearsay rule codified at O.C.G.A. § 24-3-5 because the evidence was sufficient to authorize the jury to find that there was a conspiracy between the defendant and the coconspirator to rob the victim and the victim's companions; evidence independent of the coconspirator's declarations to the witness authorized the jury to infer that the defendant and the coconspirator had entered into a conspiracy to rob the victim because there was evidence that the defendant and the coconspirator were companions, and the defendant and coconspirator were together at the scene on the day of the shooting. White v. State, 308 Ga. App. 38, 706 S.E.2d 570 (2011).

Because the defendant admitted entry into a home, the defendant's statement to a witness, and the victim's in-court identification of the defendant supported the defendant's conviction of armed robbery and burglary under O.C.G.A. §§ 16-7-1(a) and 16-8-41(a), the jury could find that a conspiracy existed without regard to a coconspirator's statements under O.C.G.A. § 24-3-5. Lewis v. State, 311 Ga. App. 54, 714 S.E.2d 732 (2011).

Trial court did not err in admitting the

testimony of a state's witness regarding statements made by a codefendant because the testimony was admissible under the conspiracy exception contained in O.C.G.A. § 24-3-5 since the witness heard the coconspirators' incriminating statements about the crimes during the pendency of the conspiracy, the witness could testify as to what the coconspirators said; the defendant's own admissions and confessions introduced in evidence showed that the defendant had committed the armed robberies and provided the details regarding the defendant's participation in the crimes. Edwards v. State, 312 Ga. App. 141, 717 S.E.2d 722 (2011), cert. denied, 2012 Ga. LEXIS 221 (Ga. 2012).

Since there was evidence that the defendant and the co-indictees engaged in a conspiracy to rob the victim, the trial court did not abuse the court's discretion in admitting the co-conspirator's statement. Foster v. State, 290 Ga. 599, 723 S.E.2d 663 (2012).

**Recorded statement of coconspirator properly admitted.**

Codefendant's statements that were recorded in telephone calls between the codefendant and an accomplice were admissible against the defendant as statements of a coconspirator. Moon v. State, 288 Ga. 508, 705 S.E.2d 649 (2011).

### Conspiracy Defined

### 2. Proof of Conspiracy

**Declarations of coconspirator admissible.**

Trial court did not err by admitting incriminating statements a codefendant made to witnesses because the codefendant's statements were made during the pendency of the conspiracy and were admissible against the defendant under the coconspirator exception to the hearsay rule, O.C.G.A. § 24-3-5; the admission of the codefendant's statements to lay witnesses during the concealment phase of the conspiracy did not violate the confrontation clause because the codefendant's statements were not testimonial. Allen v. State, 288 Ga. 263, 702 S.E.2d 869 (2010).

**Evidence was sufficient to show conspiracy in the following cases.**

Evidence adduced at trial provided sufficient circumstantial evidence of a conspiracy to possess methamphetamine with intent to distribute such that it was proper to allow a coconspirator's hearsay statements implicating the defendant in a conspiracy to distribute methamphetamine and other narcotics, including evidence that the parties lived in the same house and that the coconspirator put narcotics in the defendant's pocket as police raided the house. Dockery v. State, 308 Ga. App. 502, 707 S.E.2d 889 (2011).

### Pendency of Criminal Project

### 1. In General

**Declarations made during conspiracy, including concealment stage, admissible.**

At the time a coconspirator made statements to friends, the coconspirator had not confessed to police or been arrested, and in those statements, was concealing the coconspirator's role in the conspiracy. The trial court therefore did not abuse the court's discretion by allowing the coconspirator's statements into evidence against the defendant. Keating v. State, 309 Ga. App. 804, 711 S.E.2d 327 (2011).

## 24-3-6. (Effective until January 1, 2013) Dying declarations.

### JUDICIAL DECISIONS

Analysis

### Declarations

#### 5. Elicited by Questions

**Officer's questioning of dying victim.** — Trial court did not abuse the court's discretion in overruling the defendant's objection to an officer's testimony that the victim said that the victim thought that the defendant had shot the victim since they had been in a relationship that ended because the officer responded to the emergency situation, found the fatally wounded victim, and asked the victim what happened in order to assess the exigencies; also, the officer wanted to keep the victim talking in order to keep the victim from losing consciousness before emergency responders arrived. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

### Conscious of Condition

**Victim conscious of critical condition.** — Trial court did not err in admitting into evidence statements the victim made to an officer that the defendant shot the victim because the circumstances made a prima facie showing for the admission of the statements as the victim's dying declarations when the victim was conscious of the victim's critical condition at the time the victim made the statements; it was apparent that the victim's wounds were extremely serious, the victim was clutching a pillow to the victim's abdomen for comfort, the victim's breathing was "stressed", the victim was in great pain, and the victim appeared to be overwhelmed with fear. Sanford v. State, 287 Ga. 351, 695 S.E.2d 579 (2010), cert. denied, U.S. , 131 S. Ct. 1514, 179 L. Ed. 2d 336 (2011).

## 24-3-10. (Effective until January 1, 2013) Testimony at former trial.

### JUDICIAL DECISIONS

Analysis



### General Consideration

**Testimony at plea hearing properly excluded.** — Trial court did not abuse the court's discretion in refusing to admit under O.C.G.A. § 24-3-10 statements a co-indictee made during a plea hearing because the co-indictee's testimony at the plea hearing did not satisfy § 24-3-10, and the defendant failed to establish a substantial similarity of issues between the defendant's trial and the co-indictee's plea hearing such as would ensure that the state had an opportunity for meaningful cross-examination at the plea hearing; the state questioned the co-indictee at the co-indictee's plea hearing to establish the factual basis for the co-indictee's plea and to show that the co-indictee was entering the plea freely and voluntarily, and as the purpose of the hearing was to protect the co-indictee, the state was not afforded an opportunity for meaningful crossexamination. Silverio v. State, 306 Ga. App. 438, 702 S.E.2d 717 (2010).

### Proceedings

**Preliminary hearings.**

Trial court did not err in allowing an unavailable witness's preliminary hearing testimony to be read to the jury pursuant to O.C.G.A. § 24-3-10 because the state exercised due diligence in seeking to locate the witness; despite efforts by State officials, the witness could not be located. Thomas v. State, 290 Ga. 653, 723 S.E.2d 885 (2012).

## 24-3-14. (Effective until January 1, 2013) Records made in regular course of business admissible; effect of circumstances of making; construction of Code section.

### JUDICIAL DECISIONS

Analysis



#### Procedural Considerations

##### 1. Foundation for Admission

**Absent preliminary proof, etc.**

Condominium declarations which were submitted by a condominium unit neighbor in an action against another condominium unit owner were hearsay under O.C.G.A. § 24-3-1(a). However, the neighbor did not present admissible evidence of the heightened duty of care allegedly imposed by the declarations so that duty, therefore, could not be considered on summary judgment under O.C.G.A. § 24-3-14(b). Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96 (2011).

#### Applications and Illustrations

**Business records.**

State failed to prove that the defendant lacked the authority to possess and deliver money orders as required to support forgery convictions under O.C.G.A. § 16-9-1(a) because the trial court erred in admitting the "counterfeit" stamps on the money orders as business records under O.C.G.A. § 24-3-14(b); the determination that the money orders were counterfeit was a conclusion made by a third party institution, whose representatives did not testify at trial, and to allow the admission of the stamp as proof that the money orders were counterfeit would deprive the defendant of the right to conduct a thorough and sifting cross-examination on the determination that the money orders were counterfeit. Forrester v. State, No. A11A2343, 2012 Ga. App. LEXIS 301 (Mar. 19, 2012).

**Telephone conversation not a business record.** — Trial court erroneously admitted hearsay at trial because the document reflecting a telephone conversation between a claims representatives and an insured, which an insurer offered into evidence, did not constitute a business record admissible under O.C.G.A. § 24-3-14 since the document was nothing more than a record of a conversation; the hearsay evidence went directly to the ultimate issue before the jury, and its erroneous admission was not harmless. Saye v. Provident Life & Accident Ins. Co., 311 Ga. App. 74, 714 S.E.2d 614 (2011), cert. denied, No. S11C1857, 2011 Ga. LEXIS 984 (Ga. 2011).

**Summaries.**

Trial court abused its discretion by considering a one-page summary of the amount owed under a lease in determining damages because the record a landlord submitted was not a business record under O.C.G.A. § 24-3-14 but was a summary of such records; no underlying business records were available to the trial court or the guarantor. Patterson v. Bennett St. Props., No. A11A1964, 2012 Ga. App. LEXIS 299 (Mar. 19, 2012).

**Credit agreement and statements.** — Credit card company's summary judgment motion, supported by the sworn statement of the company's operation analyst, together with a credit card agreement and statements showing the amount due, which were admissible as business records pursuant to O.C.G.A. § 24-3-14, was properly granted. A copy of the credit application was not required. Melman v. FIA Card Servs., N.A., 312 Ga. App. 270, 718 S.E.2d 107 (2011), cert. denied, 2012 Ga. LEXIS 215 (Ga. 2012).

**Breath testing device certificates.**

Testing certificates for a breath-testing machine were properly admitted into evidence in a defendant's trial for driving under the influence (less safe and per se)

under O.C.G.A. §§ 24-3-14 and 40-6-392(f). The documents did not come within the Melendez-Diaz v. Massachusetts, U.S. , 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) standard. Ritter v. State, 306 Ga. App. 689, 703 S.E.2d 8 (2010).

**Fingerprints.**

Trial court did not abuse the court's discretion in requiring the defendant's counsel to specify the missing steps of a business record exception after defense counsel objected to the state's introduction in evidence of the defendant's fingerprint cards because even assuming that the trial court erred, the fingerprint cards were not the sole evidence linking the defendant to the crimes; an investigator testified that the investigator made a visual comparison of the defendant's fingerprints and concluded that two latent prints taken from the scene belonged to the defendant, and the investigator also testified that the results of a computer analysis identified a known print of the defendant's as the closest of ten matches to the latent print. Mallory v. State, 306 Ga. App. 684, 703 S.E.2d 120 (2010).

**Creditor failed to establish link in chain of assignment of debt.** — Chapter 7 debtor's objections to three proofs of claim held by a creditor who was the fourth assignee of each of the debts were sustained as the creditor failed to establish any links in the chain of assignment as required under Georgia law and failed to lay a proper foundation for documents used as required by the Business Records Act, O.C.G.A. § 24-3-14. An affidavit of sale from an authorized representative of one of the assignors was deficient because the affiant's testimony was not based on personal knowledge and because the only business record introduced was a contract assigning unidentified accounts; there were no documents identifying the account holder, the account number, and the account balance. In re Stephens, 443 B.R. 225 (Bankr. M.D. Ga. 2010).

## 24-3-16. (Effective until January 1, 2013) Testimony as to child's description of sexual contact or physical abuse.

### JUDICIAL DECISIONS

**Constitutional right of confrontation.**

Child Hearsay Statute, O.C.G.A. § 24-3-16, as construed by the Supreme Court in Sosebee v. State, 257 Ga. 298 (1987) and in other appellate cases, cannot pass constitutional muster because it fails to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant, and any cases suggesting the contrary are hereby overruled; however, the statute can be construed to survive a Confrontation Clause attack because the right of confrontation can be satisfied by construing the statute to require pretrial notice of the state's intent to use a child victim's hearsay statements. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012).

O.C.G.A. § 24-3-16 requires the prosecution to notify the defendant within a reasonable period of time prior to trial of the prosecutor's intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a Confrontation Clause objection; if the defendant objects, and the state wishes to introduce hearsay statements under O.C.G.A. § 24-3-16, the state must present the child witness at trial; if the defendant does not object, the state can introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability, and the trial court should take reasonable steps to ascertain, and put on the record, whether the defendant waives the defendant's right to confront the child witness. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012).

Defendant's right of confrontation was not violated by the introduction of the victim's hearsay statements under the Child Hearsay Statute, O.C.G.A. § 24-3-16, because the victim's statements to the victim's mother were non-testimonial, whereas the victim's

statement to the forensic interviewer, made several weeks after the crimes, was testimonial; but even if the victim's statement to the forensic examiner, and the statements made by the victim and the victim's mother to the police were admitted erroneously, the errors were harmless beyond a reasonable doubt. The victim's statement to the forensic interviewer was the same as the victim's statement to the victim's mother, and the statements made by the victim and the victim's mother to police were cumulative of the victim's statement to the victim's mother, as well as the mother's testimony and the forensic evidence properly admitted against the defendant. Hatley v. State, 290 Ga. 480, 722 S.E.2d 67 (2012).

**Admission of videotape.**

Evidence supported defendant's conviction for molesting defendant's granddaughter. The videotaped police interview of the victim and the testimony of the victim's mother, the child therapist, and the victim's brother concerning what the victim told them, was substantive evidence under the Child Hearsay Statute, O.C.G.A. § 24-3-16. Towry v. State, 304 Ga. App. 139, 695 S.E.2d 683 (2010).

**Evidence was sufficient for the jury to find a defendant guilty, etc.**

Trial court did not err in denying the defendant's motion for new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21 because the jury was authorized to conclude that the defendant was guilty of child molestation in violation of O.C.G.A. § 16-6-4(a)(1); under the Child Hearsay Statute, O.C.G.A. § 24-3-16, the jury was entitled to consider the victim's out-of-court statements as substantive evidence, and the victim was made available at trial for confrontation and cross-examination, at which time the jury was allowed to judge the credibility of the victim's accusations. Hargrave v. State, 311 Ga. App. 852, 717 S.E.2d 485 (2011).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012).

**Reliability of statement established.**

Although the defendant argued that the videotaped statement of the victim, which was admitted pursuant to the child hearsay statute found in O.C.G.A. § 24-3-16, was not properly admitted because the trial court failed to make the findings of reliability required by that statute, the trial court actually did make a finding that there were sufficient indicia of reliability. Moreover, an express finding in that regard was not necessary as the statutory requirement was met after both parties rested; the record contained evidence which would support such a finding. Adams v. State, 288 Ga. 695, 707 S.E.2d 359 (2011).

**Defense attorney was not subject to disqualification as a necessary witness to a child's statement.** — Molestation defendant's attorney was not subject to disqualification on the basis that the attorney's testimony was necessary for admission of a child's statement in the attorney's presence under O.C.G.A. § 24-3-16. The testimony was not necessary under Ga. St. Bar R. 4-102(d):3.7(a) because the child's mother was present at the interview and could testify to the circumstances of the statement. Schaff v. State, 304 Ga. App. 638, 697 S.E.2d 305 (2010).

**Evidence inadmissible where child unavailable to testify.**

State failed to meet the state's burden of showing that an allegedly abused child was "available to physically appear" at the deprivation hearing as required for hearsay testimony to be admissible under O.C.G.A. § 24-3-16. The juvenile court erred in relying on the hearsay testimony of a social worker and a DFCS case manager regarding what the child said. In the Interest A.T., 309 Ga. App. 822, 711 S.E.2d 382 (2011).

**Effective assistance of counsel.**

Trial counsel was not ineffective in failing to ask for a hearing on the admissibility of the child molestation victim's video-

taped statement because counsel testified that counsel chose not to request a hearing under O.C.G.A. § 24-3-16 since counsel had never seen a victim's statement declared inadmissible, and counsel did not want the delay resulting from such a request to give the state additional time to prepare the state's case; trial counsel is under no obligation to invoke his or her client's legal right to a hearing designed to protect that client's interests if the invocation of that abstract right would, in his or her professional judgment of the circumstances presented by a specific case, do actual harm to those interests. Robinson v. State, 308 Ga. App. 45, 706 S.E.2d 577 (2011).

**Statements admissible.**

There was competent evidence to support the defendant's convictions for aggravated child molestation, O.C.G.A. § 16-6-4(c), and child molestation, O.C.G.A. § 16-6-4(a)(1), because the victim's step-uncle and one of the forensic interviewers proffered evidence that the defendant sexually molested the victim pursuant to the Child Hearsay Act, O.C.G.A. § 24-3-16; although the victim testified that the defendant touched the victim in a way that the victim did not like, the victim did not provide any details about those incidents, but both the step-uncle and the forensic interviewer testified that the victim disclosed that the defendant touched the victim's privates with the defendant's hand and the defendant's own privates and forced the victim to place the victim's mouth on the defendant's privates, and the jury resolved any credibility or inconsistency issues against the defendant. Westbrooks v. State, 309 Ga. App. 398, 710 S.E.2d 594 (2011).

Trial court did not abuse the court's discretion in allowing the testimony of an investigator, a pediatrician, and a forensic interviewer regarding statements the victims made to them under the Child Hearsay Statute, O.C.G.A. § 24-3-16, because the witnesses did not opine as to whether the victims were telling the truth but rather testified regarding the victims' statements to them. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

## 24-3-17. (Effective until January 1, 2013) Admissibility of certified copies of records of Department of Public Safety or Department of Driver Services or comparable agencies in other states; admissibility of computer transmitted records.

### JUDICIAL DECISIONS

**Certified copy of driver's license.** — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown, pursuant to O.C.G.A. §§ 24-3-17 and 24-7-20. Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908 (2011).

## 24-3-18. (Effective until January 1, 2013) Admissibility of medical reports; qualifications of person signing reports; right of adverse party to cross-examine person signing reports.

### JUDICIAL DECISIONS

**Neurologist report inadmissible in undue influence case.** — Daughter failed to carry the daughter's burden of showing a genuine issue of fact as to her parent's testamentary capacity or undue influence at the time the parent signed a will excluding her as a beneficiary although the parent became ill and died

soon after executing the will. A neurologist report was not admissible under O.C.G.A. § 24-3-18 because the report was not in narrative form and relied on unexplained medical terms and lab results. Prine v. Blanton, 290 Ga. 307, 720 S.E.2d 600 (2012).

## ARTICLE 2

## ADMISSIONS

### 24-3-31. (Effective until January 1, 2013) Admissions of parties to record admissible generally; exceptions.

#### JUDICIAL DECISIONS

ANALYSIS

EXAMPLES

**Examples**

**Statements against interest.**

Trial court did not err in admitting the testimony of the defendant's mother that the defendant told the mother approximately two hours after the murder that the defendant would re-enlist in the army rather than killing people for free because the defendant's statement was readily admissible as an admission by a party under O.C.G.A. § 24-3-31. Dukes v. State, 290 Ga. 486, 722 S.E.2d 701 (2012).

### 24-3-36. (Effective until January 1, 2013) Acquiescence or silence as admission.

#### JUDICIAL DECISIONS

ANALYSIS

ILLUSTRATIONS AND APPLICATIONS

**Illustrations and Applications**

**Settlement agreement.** — Trial court erred in granting the insureds' motion to enforce a settlement agreement a parent and an administrator allegedly reached with an insurer because the insurer's tender was not sufficient to constitute acceptance of the settlement offer; the attorney for the mother and the administrator was not silent but stated the intent to consult with the parent and the administrator, the attorney committed to no deadline for responding, and the terms of the offer were in writing and equally known to all parties. Kitchens v. Ezell, No. A11A1242, 2012 Ga. App. LEXIS 290 (Mar. 16, 2012).

### 24-3-37. (Effective until January 1, 2013) What admissions not proper evidence.

#### JUDICIAL DECISIONS

ANALYSIS

APPLICATION AND ILLUSTRATIONS

**Application and Illustrations**

**Admission when no effort made to compromise.**

In a condemnation proceeding, the trial court did not err in denying the lessees' motion in limine to exclude evidence of an alleged pre-condemnation offer of compromise contained in a letter because the letter, which was sent to an appraiser and not to the Georgia Department of Transportation, was not an inadmissible offer of compromise under O.C.G.A. § 24-3-37; no condemnation proceeding was pending when the letter was sent, the terms of the letter sought to persuade against the condemnation of the property, or, alternatively, to ensure that the lessees would receive the full amount that the lessees believed would be the lessees' just and adequate compensation if condemnation occurred, and the letter did not propose a compromise of that amount. CNL APF Partners, LP v. DOT, 307 Ga. App. 511, 705 S.E.2d 862 (2010).

## 24-3-38. (Effective until January 1, 2013) Right to have whole conversation heard.

### JUDICIAL DECISIONS

**Ineffective assistance of counsel not established.** — Defendant failed to show that trial counsel was ineffective by not arguing the rule of completeness, O.C.G.A. § 24-3-38, as a means to get the defendant's entire post-stabbing statement into evidence because there were discrepancies between the defendant's trial testimony and the account of a witness regarding a statement the defendant allegedly made on the night of the stabbing; therefore, an acquittal would not likely have resulted had the jury heard the witness' testimony in its entirety. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012).

**Issue not preserved for review.** — "Rule of completeness" as a ground for admissibility was not preserved for review because defense counsel did not raise the "rule of completeness" as a ground for allowing a witness to testify to the defendant's entire statement. Carruth v. State, 290 Ga. 342, 721 S.E.2d 80 (2012).

# ARTICLE 3

# CONFESSIONS

## 24-3-50. (Effective until January 1, 2013) Only voluntary confessions admissible.

**Law reviews.** — For annual survey of law on criminal law, see 62 Mercer L. Rev. 87 (2010).

### JUDICIAL DECISIONS

**Analysis**

General Consideration
Constitutional Considerations
Voluntariness
Procedural Considerations
4. Review

### General Consideration

**Request not to be prosecuted was not confession.** — Defendant's request not to be prosecuted was not a confession and therefore was not erroneously admitted under O.C.G.A. § 24-3-50; the request not to be prosecuted was not a confession because the request did not admit every element of the crime and did not acknowledge guilt. McMahon v. State, 308 Ga. App. 292, 707 S.E.2d 528 (2011).

### Constitutional Considerations

**Waiver of Miranda rights.**

Trial court did not err by refusing to exclude the defendant's post-arrest statement, which admitted that the defendant was the shooter because the defendant did not explain how the Miranda warnings were inadequate; the defendant was advised of the rights both verbally and in writing and signed a waiver, and a detective testified that the detective secured the defendant's Miranda waiver before interrogating the defendant. Funes v. State, 289 Ga. 793, 716 S.E.2d 183 (2011).

### Voluntariness

**Hope of benefit not created.**

Defendant waived the defendant's claim that the defendant's confession to the murder of the defendant's spouse was induced by a hope of benefit or a fear of injury, in violation of O.C.G.A. § 24-3-50, by failing to raise the issue at the Jackson v. Denno hearing, at a renewed Jackson v. Denno motion made at trial, or when the statements were introduced at trial. Turner v. State, 287 Ga. 793, 700 S.E.2d 386 (2010).

Trial court erred in granting the defendant's motion to suppress a confession because investigators' statements that the defendant would go home after the interview did not offer the defendant a "hope of benefit" that would otherwise render the defendant's confession inadmissible, and the investigators' statement that the defendant would not be arrested on the spot was collateral and not the type of "hope of benefit" contemplated by O.C.G.A. § 24-3-50; even assuming that the statement was not collateral, any hope of benefit was dispelled by the officers' assertions that the officers had no control over what would ultimately happen to the defendant, and throughout the interview, the defendant expressed an understanding that there would be consequences for the defendant's actions. State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63 (2011).

Trial court did not err in admitting the defendant's pre-arrest statements because the offer to obtain counseling for the defendant did not bear on the question of punishment but involved a collateral benefit, and promises of a collateral benefit did not impact a statement's admissibility; the defendant offered no evidence that the officers induced the defendant to believe the defendant would receive a three year sentence, but the defendant came up with that scenario on the defendant's own, and the trial court, therefore, properly found the defendant's statements were voluntary and admissible. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

Trial court did not err by allowing the defendant's inculpatory statements to police. An investigator's statement that defendant's lack of cooperation showed that the defendant was "not trying to help" oneself was an encouragement to tell the truth and did not constitute an impermissible hope of benefit under O.C.G.A. § 24-3-50. Rogers v. State, 289 Ga. 675, 715 S.E.2d 68 (2011).

Trial court's decision to admit the defendant's apology letter to the victims was not erroneous because the trial court was authorized to find that the investigative officer's techniques were not impermissible and did not render the apology letter involuntary; the investigating officer's request for an apology letter did not induce the defendant's confession because the investigating officer stated that the officer did not promise the defendant a reduced charge or sentence in exchange for the defendant's cooperation. Edwards v. State, 312 Ga. App. 141, 717 S.E.2d 722 (2011), cert. denied, 2012 Ga. LEXIS 221 (Ga. 2012).

Trial court did not err in admitting statements the defendant made during a custodial interrogation under O.C.G.A. § 24-3-50 because officers' statements that the defendant had to "man up" and

"own up" to the charges and that the defendant's assistance would go a long way in helping the defendant out did not constitute promises of a lighter sentence; upon beginning the interview with the police, the defendant immediately told the officers that the defendant was willing to work with the officers if the officers were willing to work with the defendant, and the officers responded by stating that the officers had no authority to make promises but would listen. Nowell v. State, 312 Ga. App. 150, 717 S.E.2d 730 (2011).

**Promise of collateral benefit.**

It was not error for a trial court to decline to exclude the defendant's custodial statements on the theory that the statements were made based on an improper hope of benefit because an officer's promise not to tell the defendant's wife that the defendant had been arrested merely promised a collateral benefit which did not render the statements excludable. Millsaps v. State, 310 Ga. App. 769, 714 S.E.2d 661 (2011).

**Facts sufficient to support voluntariness.**

Even if investigators' statements that the defendant would be allowed to go home after the interview constituted an improper "hope of benefit," the investigators did not actually induce the defendant's confession because the defendant made the incriminatory statements voluntarily; the defendant was familiar with the defendant's constitutional rights, was 19 years old at the time of the interview, was a high school graduate, was aware of the allegations against the defendant, was not in custody when the defendant initially confessed, was not yet indicted, and was questioned for approximately two hours but confessed after less than one hour. State v. Brown, 308 Ga. App. 480, 708 S.E.2d 63 (2011).

Trial court properly ruled that the defendant's inculpatory statement was not subject to suppression as involuntary because the defendant received Miranda warnings at the beginning of the interview, before making the statement, and the defendant acknowledged those warnings again part-way through the interview. Williams v. State, No. A11A1662, 2012 Ga. App. LEXIS 183 (Feb. 23, 2012).

**Defendant's statement was not involuntary, etc.**

Testimony that the defendant, who worked as a detention officer, might be fired if the defendant did not talk to the investigator who questioned the defendant was true and was simply a recounting of fact and, thus, did not support a finding that the defendant's confession was coerced under O.C.G.A. § 24-3-50. Duncan v. State, No. A11A1717, 2012 Ga. App. LEXIS 318 (Mar. 22, 2012).

### Procedural Considerations

#### 4. Review

**Law of the case.** — Because the supreme court ruled adversely to the defendant in the defendant's first appeal on the issue of whether an incriminating statement the defendant made during a custodial interrogation should have been suppressed as involuntarily made, that decision was the law of the case. Foster v. State, 290 Ga. 599, 723 S.E.2d 663 (2012).

## 24-3-51. (Effective until January 1, 2013) Confessions under spiritual exhortation or promise of secrecy or collateral benefit admissible.

### JUDICIAL DECISIONS

**Promise to secure counseling.**

Trial court did not err in admitting the defendant's pre-arrest statements because the offer to obtain counseling for the defendant did not bear on the question of punishment but involved a collateral benefit, and promises of a collateral benefit did not impact a statement's admissibility; the defendant offered no evidence that the officers induced the defendant to believe the defendant would receive a three year sentence, but the defendant came up with that scenario on the defendant's own, and the trial court, therefore, properly

found the defendant's statements were voluntary and admissible. Dunson v. State, 309 Ga. App. 484, 711 S.E.2d 53 (2011).

**Waiver.** — Because defendant requested the future assistance of an attorney, not immediate assistance, and because defendant knew that defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in O.C.G.A. §§ 24-3-51 and 24-9-22 was inapplicable; therefore, defendant's confession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1 (2010).

## 24-3-52. (Effective until January 1, 2013) Against whom confession of conspirator admissible.

### JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

#### General Consideration

**Cited** in Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010); Gilmore v. State, No. A11A2142; No. A11A2143, 2012 Ga. App. LEXIS 323 (Mar. 22, 2012).

## 24-3-53. (Effective until January 1, 2013) Admissions and confessions received with care; no conviction on uncorroborated confession.

### JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CORROBORATION

#### General Consideration

**Cited** in Loyd v. State, 288 Ga. 481, 705 S.E.2d 616 (2011).

#### Corroboration

**Sufficient corroboration of confession of murder when no body was found.** — Pursuant to O.C.G.A. § 24-3-53, a defendant's confession was sufficiently corroborated by evidence that the victim disappeared near the time of the Super Bowl, that the victim left with the defendant to go to the Super Bowl, that the defendant always carried a .380 handgun, and that the defendant had shot the other victim. Rogers v. State, 290 Ga. 401, 721 S.E.2d 864 (2012).

# CHAPTER 4

# PROOF GENERALLY

**Article 4**

**DNA Analysis upon Conviction of Certain Sex Offenses**

Sec.
24-4-60 through 24-4-65. Redesignated.

## ARTICLE 1

## GENERAL PROVISIONS

### 24-4-3. (Effective until January 1, 2013) Amount of mental conviction required; preponderance of evidence in civil cases.

**Law reviews.** — For article, "State of Emergency: Why Georgia's Standard of Care in Emergency Rooms is Harmful to Your Health," see 45 Ga. L. Rev. 275 (2010).

### 24-4-6. (Effective until January 1, 2013) When conviction may be had on circumstantial evidence.

**JUDICIAL DECISIONS**

ANALYSIS



**General Consideration**

**Venue, etc.**

Evidence was sufficient to prove venue in Effingham County, Georgia beyond a reasonable doubt because the state showed that the crime was committed at the defendant's residence and that Effingham County 9-1-1 dispatchers received the defendant's 9-1-1 call and dispatched Effingham County EMS and police to the defendant's address; the victim's attending physician telephoned the Effingham County sheriff's office to report that a crime was committed at the defendant's address. Brinson v. State, 289 Ga. 150, 709 S.E.2d 789 (2011).

**Cited** in Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010); Glass v. State, 304 Ga. App. 414, 696 S.E.2d 140 (2010); Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010); Valdez v. State, 310 Ga. App. 274, 712 S.E.2d 656 (2011).

**Exclusion of Reasonable Hypothesis**

**Applicability.** — Evidence was sufficient to support a defendant's conviction for aggravated assault. The reasonable hypothesis rule in O.C.G.A. § 24-4-6 was not applicable in the case as the evidence was not entirely circumstantial, in that the state presented direct evidence of the defendant's participation in the events at issue, that the defendant carried a shotgun from the scene of the assault, that the defendant rode away with the weapon near the defendant in the car, and that the

defendant fled from police, both in the car and on foot. Emerson v. State, No. A11A1902, 2012 Ga. App. LEXIS 331 (Mar. 23, 2012).

### Instructions

**When charge not required.**

Reasonable hypothesis rule regarding circumstantial evidence under O.C.G.A. § 24-4-6 did not apply in a defendant's trial for the murder and involuntary manslaughter of defendant's 17-month-old son because the evidence was not entirely circumstantial, given the defendant's direct admissions that the defendant had shaken defendant's son to make the child stop crying. Lewis v. State, 304 Ga. App. 831, 698 S.E.2d 365 (2010).

Trial court failed to give a complete jury charge on circumstantial evidence because the evidence against the defendant was both direct and circumstantial and, thus, the statutory language of O.C.G.A. § 24-4-6 was not required. Evans v. State, 288 Ga. 571, 707 S.E.2d 353 (2011).

Trial court did not err in refusing to give a requested jury instruction based on O.C.G.A. § 24-4-6, concerning a conviction based on circumstantial evidence because such a charge was not warranted since the state's evidence supporting the defendant's conviction was not circumstantial; the state relied on direct evidence in the form of the eyewitness testimony of the two police officers. Crawford v. State, No. A11A1637, 2012 Ga. App. LEXIS 149 (Feb. 17, 2012).

### Sufficiency of Circumstantial Evidence

**Evidence insufficient to show knowledge that car was unregistered.** — Evidence that a defendant received and drove a car following the defendant's father's death was insufficient to prove a violation of O.C.G.A. § 40-6-15 because there was no evidence from which the jury could infer that the defendant knew that the car was not registered. Lawson v. State, 313 Ga. App. 751, 722 S.E.2d 446 (2012).

**Evidence sufficient for armed robbery conviction.**

Rational trier of fact was authorized to find the defendant guilty beyond a reasonable doubt of being a party to the crime of robbery in violation of O.C.G.A. §§ 16-2-20 and 16-8-40 because the defendant's admission that the defendant was present at the scene of the robbery, in conjunction with the defendant's possession of the recently stolen item, which the jury could find was unsatisfactorily explained by defendant, was sufficient to support the defendant's robbery conviction; the jury was entitled to reject the defendant's version of events because although the defendant contended that the defendant's videotaped police interview and defendant's trial testimony created a reasonable hypothesis of innocence, defendant's interview and trial testimony were not consistent with one another in all material respects, and defendant's statements also were inconsistent with the testimony of the pursuing patrol officers. Boggs v. State, 304 Ga. App. 698, 697 S.E.2d 843 (2010).

Evidence of the circumstances was sufficient to establish the defendant's identity as the perpetrator and the defendant's guilt of armed robbery, O.C.G.A. § 16-8-41, aggravated assault, O.C.G.A. § 16-5-21, and possession of a firearm during the commission of a crime, O.C.G.A. § 16-11-106, because the defendant matched the description of the perpetrator given by both a convenience store clerk and another store employee; when the defendant was apprehended, an officer recovered next to the defendant's person the contraband and instrumentalities used in the commission of the robbery. Daniels v. State, 310 Ga. App. 562, 714 S.E.2d 91 (2011).

**Evidence insufficient for armed robbery conviction.** — Evidence was insufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41(a) because the evidence supported two equally reasonable hypotheses, which did not meet the standard of O.C.G.A. § 24-4-6; there was no direct evidence regarding where the victim was when the defendant entered the victim's kitchen, and there was no evidence, like signs of forced entry, from which the jury could have reasonably inferred that the victim heard and confronted the defendant before the defen-

dant could take anything or that the victim usually kept the victim's wallet on the victim's person or in the victim's bedroom, which could support an inference that the defendant had to confront the victim before taking the wallet. Fox v. State, 289 Ga. 34, 709 S.E.2d 202 (2011).

Defendant's armed robbery conviction had to be overturned because the evidence failed to establish that the victim's debit card was taken with force before or contemporaneous with the taking, and the evidence failed to establish whether the defendant first took the debit card and then killed the victim or whether the defendant killed the victim and then took the debit card; the evidence incriminating the defendant of armed robbery was wholly circumstantial, and both scenarios were equally reasonable. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011).

**Evidence sufficient for marijuana conviction.**

Evidence was sufficient to authorize the defendant's conviction for possessing more than one ounce of marijuana because the defendant was presumed to have exclusive possession and control of the marijuana that a police officer found in the car the defendant was driving; as the factfinder, the jury was entitled to reject the testimony of the defendant's friend that the marijuana was the friend's and to determine that the presumption of the defendant's possession of the marijuana had not been rebutted. Nix v. State, 312 Ga. App. 43, 717 S.E.2d 550 (2011).

Trial court did not err in convicting the defendants of felony possession of more than one ounce of marijuana in violation of O.C.G.A. § 16-13-30(j)(1) because the trial court was authorized to conclude that the defendants had equal access to and joint constructive possession of the marijuana that was found in a minivan and that the defendants participated as parties to the drug possession offense; the defendants, who were passengers in the back of the minivan, knew that marijuana was inside the minivan, and the driver informed an officer that the passengers were hiding marijuana inside the minivan. Dennis v. State, 313 Ga. App. 595, 722 S.E.2d 190 (2012).

**Evidence sufficient for possession with intent to distribute.**

Evidence was sufficient to support the defendant's conviction for possession with intent to distribute marijuana because the defendant was in possession of clear, plastic baggies, smaller baggies of suspected marijuana, a digital scale, and cash, and a police officer testified that in the officer's capacity as a marijuana tester for the county sheriff's office, the officer tested a total of 11 bags, containing approximately 190 grams of a substance that tested positive for marijuana; possession of a scale, baggies, and large amounts of currency along with drugs can constitute circumstantial evidence of intent to distribute. Hardaway v. State, 309 Ga. App. 432, 710 S.E.2d 634 (2011).

**Evidence sufficient to show substance cocaine.** — Trial court did not err in revoking probation on the ground that the probationer committed the felony offense of possession of cocaine with intent to distribute because the trial court did not manifestly abuse the court's discretion when the court found by a preponderance of the evidence that the substance found in the car in which the probationer was riding was cocaine; in addition to an officer's opinion on the identity of the substance, the record contained other circumstantial evidence indicating that the substance was cocaine, and the circumstantial evidence of the substance's identity was not offered to convict the probationer of possession of cocaine, but was offered to show that the probationer had violated a term of probation and, as such, was subject to a different standard of proof. Thurmond v. State, 304 Ga. App. 587, 696 S.E.2d 516 (2010).

**Evidence insufficient to convict defendant of possession of cocaine with intent to distribute.**

Codefendant's convictions for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), and possession with intent to distribute a controlled substance within 1,000 feet of a housing project, O.C.G.A. § 16-13-32.5(b), was unsupportable as a matter of law, and the trial court erred by denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence and

the reasonable inferences derived therefrom were insufficient to connect the codefendant to the cocaine, which was found in an upstairs bedroom occupied by the codefendants; no evidence was introduced to show that the codefendant resided in the apartment where the cocaine was found, which could authorize an inference that the codefendant possessed the property therein. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

**Evidence sufficient for possession of dangerous drugs conviction.** — Jury was authorized to conclude that the defendant intended to possess a dangerous drug in violation of the Dangerous Drug Act, O.C.G.A. § 16-13-72, even if the defendant was subjectively unaware of the precise chemical compound in the bottle and its regulated nature because there was evidence supporting an inference that the defendant used a dangerous drug to sedate the defendant's sexual battery victim, and that conduct demonstrated the defendant's knowledge of the harmful effect of the compound; the term "dangerous drug" was defined to include alkyl nitrite, which was the compound the defendant possessed. Serna v. State, 308 Ga. App. 518, 707 S.E.2d 904 (2011).

**Burglary conviction.**

Trial court did not err in convicting the defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because there was sufficient evidence from which the jury could conclude that the defendant entered the victim's apartment without permission when although the victim, who owned the apartment, did not testify at trial, the evidence was that the victim had changed the locks after the defendant moved out and that the defendant could no longer use the defendant's keys; on the day of the burglary, the defendant attempted unsuccessfully to use the defendant's keys and then went around to the patio, climbed over the railing around the patio, and went, uninvited, into the apartment through the patio door. Ursulita v. State, 307 Ga. App. 735, 706 S.E.2d 123 (2011).

Circumstantial evidence was sufficient under O.C.G.A. § 24-4-6 for defendant's conviction of burglary because: (1) an investigating officer, who responded to a burglary alarm at a townhouse, found the defendant coming from the back of the townhouse; (2) the defendant said that the defendant had just put the defendant's dog away through the back door of the defendant's neighboring townhouse; (3) the defendant's shoe print was found outside the broken window of the townhouse with the alarm, and the defendant had a remote control in the defendant's pocket that operated a television set that had been unplugged and was put on the floor by the front door of the townhouse; and (4) the defendant's fingerprints were found on the television. Reggler v. State, 307 Ga. App. 721, 706 S.E.2d 111 (2011).

Evidence was sufficient to convict a defendant of burglarizing a tool supply store because the defendant's blood was found on the smashed-in door and the defendant had two prior convictions for strikingly similar hardware store burglaries. Although the evidence was circumstantial, there was no other evidence of how the defendant's blood could have been at the scene. The trial court's definition of "entry" as entry on to real estate was not error or if error was not harmful, because the charge as a whole required that the defendant enter the building. Roberts v. State, 309 Ga. App. 681, 710 S.E.2d 878 (2011).

Evidence was sufficient to convict a defendant of burglary in violation of O.C.G.A. § 16-7-1(a) because the defendant was caught within four minutes of the burglary in a truck matching the victims' description of the truck outside their home, and the defendant was carrying a crowbar, had the victims' television, and fled from police. Veasley v. State, 312 Ga. App. 728, 719 S.E.2d 585 (2011).

**Malice murder.**

Trial court did not err in denying the codefendant's motion for a directed verdict of acquittal because the circumstantial evidence the state presented was sufficient to authorize a rational trier of fact to find the codefendant guilty beyond a reasonable doubt of the malice murder of a girlfriend's child; both the girlfriend and the codefendant were with the child during the time period within which the fatal injuries were believed to have been inflicted upon the child. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

**Evidence sufficient for felony murder and armed robbery convictions.**

Defendant's conviction for felony murder and armed robbery was not based upon insufficient circumstantial evidence because there was directed evidence of the defendant's guilt; the conviction was supported by an eyewitness identification, DNA consistent with the defendant's on the crack in the windshield of the getaway car, the defendant's fingerprint on the handle of the driver's door of the getaway car, and the defendant's birth certificate and mail in the getaway vehicle. Sanders v. State, 290 Ga. 637, 723 S.E.2d 436 (2012).

**Evidence sufficient for cocaine possession and possession with intent to distribute conviction.**

Evidence was sufficient to sustain the defendant's convictions for trafficking in cocaine, a violation of O.C.G.A. § 16-13-31(a)(1), and possession of ecstasy, a violation of O.C.G.A. § 16-13-30(a), although the defendant was neither in actual possession of the contraband nor in control of the vehicle where the contraband was found because there was slight evidence of access, power, and intention to exercise control or dominion over the contraband and, therefore, excluding every other reasonable hypothesis save that of defendant's guilt, as required under O.C.G.A. § 24-4-6, the question of constructive, joint possession was within the jury's discretion. The ecstasy pills were found in a prescription pill bottle belonging to the defendant, and the pill bottle was found in a bag with the cocaine. Ferrell v. State, 312 Ga. App. 122, 717 S.E.2d 705 (2011).

**Evidence sufficient for methamphetamine possession conviction.**

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal after a jury found the defendant guilty of possession of methamphetamine because the totality of the evidence, although circumstantial, was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt and to reject as speculative and unreasonable the hypothesis that someone else discarded the drugs in a patrol car; the defendant possessed a homemade smoking pipe containing methamphetamine residue, there was similar transaction evidence, and the patrol officer testified that the officer had exclusive control of the officer's patrol car, the officer stayed with the officer's car whenever the car was serviced by third parties, the officer searched the backseat immediately after the defendant exited from the car, and the officer discovered the drugs directly up under the seat where the defendant had been sitting. Taylor v. State, 305 Ga. App. 748, 700 S.E.2d 841 (2010).

Evidence supporting the defendant's conviction for methamphetamine possession was sufficient because the presumption of possession and control attached since the state presented evidence that the defendant was the sole resident of the house present during the execution of the search warrant when the methamphetamine was found in a common area of the house; the presumption of possession was not the sole evidence connecting the defendant to the crime of possession because the arresting officer testified that the defendant exhibited clear signs of methamphetamine intoxication. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010).

**Evidence sufficient to support conviction of trafficking in methamphetamine.** — Trial court did not err in denying a codefendant's motion for a directed verdict on the charge of trafficking in methamphetamine because based upon the circumstantial evidence presented, the jury was authorized to find that the codefendant was in joint constructive possession of the methamphetamine with the defendant, which was located at the kitchen table where the defendant had been sitting; the defendant lived at the residence with the codefendant, the defendant was present at the time of a controlled buy, and the defendant had access to the drugs that were seized from the kitchen table. Fyfe v. State, 305 Ga. App. 322, 699 S.E.2d 546 (2010).

Trial court did not err in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(f)(1) because given the evidence, the jury was authorized under O.C.G.A. § 24-4-6 to find that the defen-

dant was guilty beyond a reasonable doubt as either the actual perpetrator or as a party to the crime of the offense of trafficking in methamphetamine as charged in the indictment; officers executing a search warrant for a house discovered the defendant on a couch with a codefendant and baggies of methamphetamine. Hughes v. State, 309 Ga. App. 150, 709 S.E.2d 900 (2011).

**Evidence sufficient to support conviction of credit card fraud.** — Jury was authorized to find that the defendant acted with guilty knowledge and intent to commit credit card theft in violation of O.C.G.A. § 16-9-31(a)(1) because the evidence established that the defendant obtained unauthorized possession of the victim's credit card, and there was circumstantial evidence from which an inference could be drawn that the defendant had knowledge that the defendant was accepting the credit card without authority and as part of an unlawful scheme; when the defendant was confronted by police officers, the defendant fled, and the defendant maintained unauthorized possession of a different credit card, along with additional items that could be used to engage in fraudulent credit transactions. Amaechi v. State, 306 Ga. App. 333, 702 S.E.2d 680 (2010).

**Evidence held sufficient to support conviction.**

Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car; the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window, and another deputy assigned to the drug suppression task force testified, without objection, that the amount of cocaine in the bag was more than a user would have in a user's possession and that would be the amount that a mid-level dealer would have in a dealer's possession. McCombs v. State, 306 Ga. App. 64, 701 S.E.2d 496 (2010).

Circumstantial evidence was sufficient to support the defendant's convictions for malice murder and theft by taking because: (1) after the victim, who was the defendant's roommate, disappeared, the defendant began driving the victim's car; (2) a witness who lived on a street on which the defendant used to live and that was miles away from the defendant's residence noticed a fire on the side of the road and a person squatting by the road watching the fire; (3) the victim's burned body was later found at the road side; (4) the victim's body had been burned, decapitated, drained of almost all blood, and cut into pieces; (5) the defendant told the police detectives who went to the defendant's apartment that the victim was on vacation and that the defendant did not know where the victim was; (6) the defendant's apartment had been recently cleaned and cleaning supplies were found in the apartment; (7) Luminol testing faintly revealed the presence of blood on the bathtub and surrounding walls of the apartment; (8) the trash which was collected from the apartment's dumpster included the victim's wallet, driver's license, and debit card; and (9) broken furniture, socks, and a sheet with the victim's blood were found in the trash. Adel v. State, 290 Ga. 690, 723 S.E.2d 666 (2012).

Defendant's conviction for possession of drugs by an inmate in violation of O.C.G.A. § 42-5-18(c) was reversed because the state failed to present any evidence to support even an inference that the defendant had any prior knowledge of drugs that were found in a bag or any idea what was in the bag; the state failed to demonstrate that the defendant had the bag in the defendant's possession for any reason other than the performance of the defendant's assigned duties of cleaning the visitation lobby in the prison and, thus, failed to exclude the reasonable hypothesis that the defendant was merely performing the job when the defendant removed the bag from one trash can and placed the bag in the other. Strozier v. State, 313 Ga. App. 804, 723 S.E.2d 39 (2012).

**Evidence sufficient for murder conviction.**

Evidence was sufficient to authorize the jury to find the defendant guilty of armed robbery and malice murder because the victim went missing shortly after coming into a substantial amount of cash, the defendant had access to the victim's home, and the defendant was seen driving around in the victim's two vehicles, selling the victim's property, and with a large amount of cash; the victim died from blunt trauma to the head, a mallet with blood on the mallet was found inside the house, and a witness testified that the defendant confided to the witness that the defendant killed the victim, placed the victim's body in a freezer, and took the victim's money. Cutrer v. State, 287 Ga. 272, 695 S.E.2d 597 (2010).

Evidence was sufficient under O.C.G.A. § 24-4-6 to support the defendant's convictions for malice murder, felony murder, aggravated assault, possession of a knife during the commission of a crime, financial transaction card fraud, and recidivism because there was evidence placing the defendant at the victim's home during the time of the murder and evidence of the victim's blood on the defendant's shoes, which the defendant intentionally chose not to wear when being questioned by police; the evidence, together with the defendant's own statements regarding his use of the victim's debit card, was sufficient to authorize the jury to determine that the state excluded all reasonable hypotheses save that of the defendant's guilt and to find the defendant guilty beyond a reasonable doubt of the crimes of which he was convicted. Johnson v. State, 288 Ga. 771, 707 S.E.2d 92 (2011).

Circumstantial evidence presented was sufficient under O.C.G.A. § 24-4-6 to support the defendant's felony murder conviction because the evidence established that a witness saw the defendant in possession of a gun, that the defendant went to the victim's home, that the defendant used the defendant's gun to coerce the victim into the victim's car and to drive as the defendant instructed, that the victim stopped the victim's car and the victim and the defendant exited and went behind some bushes, that multiple gunshots were heard, that a witness saw the defendant step from behind the bushes and run back toward the car, and that the victim's body was found behind the bushes with 10 gunshots, including five shots to the head. Brown v. State, 288 Ga. 902, 708 S.E.2d 294 (2011).

**Evidence sufficient for burglary convictions.**

Circumstantial evidence was sufficient for the factfinder to determine beyond a reasonable doubt that the defendant juvenile committed burglary in violation of O.C.G.A. § 16-7-1(a) and possession of a weapon during the commission of a crime in violation of O.C.G.A. § 16-11-106(b)(2) because the defendant was in the vicinity of the victim's apartment shortly after the burglary, wearing a jacket that matched the victim's description of the jacket worn by the perpetrator, carrying a loaded pistol, and wearing shoes that matched the tread pattern and size of the muddy footprints found in the victim's apartment. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010).

**Evidence sufficient for malice murder conviction.**

Evidence was sufficient to enable a rational trier of fact to find the defendant guilty of malice murder, armed robbery, and aggravated assault beyond a reasonable doubt because although the defendant denied to police that the defendant had any contact with the silver car that was connected to the robbery, the defendant's fingerprints were found on the outside of the car; an eyewitness's physical description of the second gunman from the robbery matched the defendant. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011).

**Evidence sufficient for possession of cocaine conviction.**

Trial court was authorized to find a defendant guilty of possession of cocaine on the basis that the evidence excluded every other reasonable hypothesis save that of the defendant's guilt, pursuant to O.C.G.A. § 24-4-6, as the state presented evidence other than the defendant's mere spatial proximity to the pipe containing cocaine to show that the defendant had constructive possession over it, in that the pipe, which was found on the grass where

the defendant had been arrested, was dry, although it had been raining and the surrounding area was "soaked"; from this evidence the factfinder could infer that the pipe had been on the ground for a very short period of time. In addition, the state introduced similar transaction evidence that the defendant had been carrying a small crack pipe in the pocket of the defendant's jacket on the occasion of an earlier arrest. Brown v. State, 314 Ga. App. 212, 723 S.E.2d 504 (2012).

**Evidence sufficient for possession of cocaine with intent to distribute and proximity to housing project convictions.**

Evidence was sufficient to support the defendant's conviction for possession of cocaine with intent to distribute, O.C.G.A. § 16-13-30(b), because the evidence established beyond any reasonable doubt that the defendant had the power and the intent to exercise control over the cocaine, and the state established by overwhelming circumstantial evidence that the defendant was in either constructive or actual possession of the cocaine; the defendant was found kneeling over the contraband, the jury was authorized to infer that the defendant had been "fidgeting" with a piggy bank in which 37 small bags of cocaine were hidden, and pants with the defendant's driver's license and cash were found in the same corner of the bedroom as the cocaine. Jackson v. State, 306 Ga. App. 33, 701 S.E.2d 481 (2010).

**Evidence sufficient for aggravated assault conviction.** — Evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt as a party to two counts of aggravated assault in violation of O.C.G.A. § 16-5-21 because even though the defendant did not actually use a weapon, there was evidence that an accomplice brandished a handgun and pointed the handgun at both the manager and the clerk of the video store, and the accomplice's use of a weapon could be attributed to the defendant; one who intentionally aids or abets the commission of a crime by another is a party to the crime and equally guilty with the principal, and reasonable apprehension of injury can be proved by circumstantial or indirect evidence as well as by direct or positive evidence since the presence of a gun would normally place a victim in reasonable apprehension of being injured violently. Rainly v. State, 307 Ga. App. 467, 705 S.E.2d 246 (2010).

**Evidence insufficient to show constructive possession of controlled substance.** — Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally likely that the pills belonged to the driver of the truck where the pills were found. Scott v. State, 305 Ga. App. 596, 699 S.E.2d 894 (2010).

**Evidence insufficient for theft by receiving stolen property.** — Juvenile court erred by adjudicating the defendant juvenile delinquent for violating O.C.G.A. § 16-8-7(a) by committing theft by receiving a stolen motorcycle because the evidence did not support the finding that the defendant should have known that the motorcycle was stolen; the defendant's testimony permitted an inference that only after learning of the theft did the defendant realize that the motorcycle was stolen, the defendant rode the motorcycle on the street in front of the victim's house, and there was no evidence that the defendant tried to conceal the motorcycle; absent evidence of the real value of the motorcycle at the time of the theft, the evidence did not support a finding that the price the defendant offered to pay for the motorcycle was grossly disproportionate to the value. In re J. L., 306 Ga. App. 89, 701 S.E.2d 564 (2010).

**Evidence sufficient for theft by taking conviction.** — Circumstantial evidence was sufficient to authorize the jury to exclude every reasonable hypothesis except that the defendant was guilty of theft by taking because an ATM was removed from a bank's property without authorization, defendant's vehicle was observed at the bank approximately two

hours before the theft was reported and shortly after the alarm was activated; tire tracks at the scene matched the tire prints on the defendant's vehicle, the vehicle had a tow strap with a large metal hook tied to it, scrape marks consistent with a heavy object being drug on the pavement led from the ATM's location in the direction of a nearby grassy lot, where the ATM was later found, and the defendant possessed black electrical tape and gloves upon the defendant's arrest; the jury was authorized to consider the defendant's flight from the scene and police as circumstantial evidence of the defendant's guilt. Tauch v. State, 305 Ga. App. 643, 700 S.E.2d 645 (2010).

Rational trier of fact was authorized to find that the evidence was sufficient to exclude every reasonable hypothesis except that of the defendant's guilt and to conclude beyond a reasonable doubt that the defendant was guilty of theft by taking, O.C.G.A. § 16-8-2, because there was evidence that the defendant was alone for 20 minutes or more on the floor of the house where the money was kept and where no cleaning was to be performed; while there was circumstantial evidence that also implicated another house cleaner, reasonable jurors could have found from the evidence that the hypothesis that the house cleaner took the money was excluded based on testimony that the defendant had been alone in the area of the house where the money was kept, and there was no such evidence regarding the house cleaner. Cookston v. State, 309 Ga. App. 708, 710 S.E.2d 900 (2011).

Evidence that a defendant showed an interest in a car that was for sale and took a test drive and returned the car, that the car was stolen the next day, that the defendant was found driving the car hours after the car was stolen using a duplicate key, and that the defendant fled from an officer was sufficient to authorize the defendant's conviction for theft by taking (automobile) in violation of O.C.G.A. § 16-8-2(a). Kelly v. State, 313 Ga. App. 582, 722 S.E.2d 175 (2012).

**Evidence insufficient for methamphetamine possession.**

Trial court erred in convicting the defendant of trafficking in methamphetamine in violation of O.C.G.A. § 16-13-31(e)(3) because although the evidence raised grave suspicions of the defendant's guilt, the state failed to establish that the defendant had both the power and the intention at the time of the defendant's arrest to exercise dominion or control over the drugs and failed to show that other men did not have equal access to the house and the items within the house; all of the evidence was circumstantial with regard to the defendant's constructive possession of the contraband, there was nothing in the case linking the defendant to the drugs or manufacturing equipment in the house, and several other people with access to the house were unaccounted for and were not charged. Aquino v. State, 308 Ga. App. 163, 706 S.E.2d 746 (2011).

**Evidence sufficient for aggravated assault.** — Trial court did not err in convicting the defendant and the defendant's codefendant of aggravated assault because based on the circumstantial evidence, the jury was entitled to infer that the defendant and the codefendant accompanied their accomplice to a convenience store knowing that the accomplice intended to assault the victim because of their past differences, that the defendant had specifically served as the getaway driver, and that the codefendant had accompanied the accomplice inside the store as a lookout, making both individuals parties to the aggravated assault. Romero v. State, 307 Ga. App. 348, 705 S.E.2d 195 (2010).

**Evidence insufficient for marijuana possession conviction.**

Trial court erred in revoking the defendant's probation because the evidence was insufficient to support the trial court's finding that the defendant committed the new offense of possession of less than one ounce of marijuana since the state presented no evidence other than the defendant's mere spatial proximity to the marijuana to support a finding that the defendant had the intent to exercise dominion and control over the marijuana; there was no drug paraphernalia, the defendant was cooperative with the police and did not try to flee, there was no evidence that the defendant tried to hide

or conceal anything in the vehicle or that the defendant had continuous access and control over the vehicle, and the defendant did not have any marijuana in the defendant's possession and was not under the influence of drugs. Smith v. State, 306 Ga. App. 54, 701 S.E.2d 490 (2010).

## 24-4-8. (Effective until January 1, 2013) Number of witnesses required generally; exceptions; effect of corroboration.

### JUDICIAL DECISIONS

Analysis



#### General Consideration

**Testimony of single witness to establish fact.**

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of self-defense, O.C.G.A. § 16-3-21(a), because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to enable a rational trier of fact to find that the defendant's stabbing of the victim was not justified as an act of self-defense; under O.C.G.A. § 24-4-8, a neighbor's eyewitness testimony, standing alone, was sufficient to support a finding that the defendant was the aggressor, continued to use force after any imminent danger posed by the victim had passed, or used excessive force. Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

Evidence from a child molestation victim was sufficient to convict a defendant of five counts of child molestation in violation of O.C.G.A. § 16-6-4. The trial court properly admitted evidence that the defendant had asked the victim's sister to sleep with the defendant on a couch, and properly denied evidence that the victim had made an accusation of sexual misconduct against the victim's grandfather. Mauldin v. State, 313 Ga. App. 228, 721 S.E.2d 182 (2011).

**Victim's testimony sufficient.**

Evidence was sufficient to authorize a rational trier of fact to find beyond a reasonable doubt that the defendant was guilty of malice murder, aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a crime because although one of the victim's identification was the only evidence linking the defendant to the crimes, the determination of a witness' credibility, including the accuracy of eyewitness identification, was within the exclusive province of the jury, and under O.C.G.A. § 24-4-8, the testimony of a single witness was generally sufficient to establish a fact. Reeves v. State, 288 Ga. 545, 705 S.E.2d 159 (2011).

Defendant's convictions for kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property were authorized because pursuant to O.C.G.A. § 24-4-8, the victim's testimony alone established the essential elements of the offenses. Lester v. State, 309 Ga. App. 1, 710 S.E.2d 161 (2011).

Trial counsel's failure to cross-examine the codefendant about a plea deal was not patently unreasonable because trial counsel's decision not to question the codefendant due to the potential harm to the defendant was a tactical and strategic decision; even if trial counsel performed

deficiently, the defendant could not show prejudice in light of the overwhelming evidence against the defendant, and even in the absence of the defendant's testimony placing the defendant at the scene and acknowledging that the defendant hit the victim, under O.C.G.A. § 24-4-8, the victim's testimony alone was sufficient to establish the facts necessary to support the defendant's convictions. Bonner v. State, 308 Ga. App. 827, 709 S.E.2d 358 (2011).

Trial court did not err in denying the defendant's motion for a directed verdict after a jury found the defendant guilty of bus hijacking, O.C.G.A. § 16-12-123(a)(1)(A), because the jury was authorized to conclude beyond a reasonable doubt that the defendant exercised control of the bus by force; the defendant brandished a handgun in the open door of the bus as the defendant ordered a passenger to get off, and the bus driver testified that the driver did not feel free to drive away because the driver felt the driver's life was in danger and the driver did not want to agitate the defendant. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

Because the victim's testimony was legally sufficient under O.C.G.A. § 24-4-8 to establish that the defendants assaulted the victim with intent to rob, the issue of which defendant actually held the weapon was immaterial; therefore, pursuant to O.C.G.A. § 16-2-20(a), the evidence was sufficient to find them both guilty of aggravated assault with intent to rob and of possession of a firearm during the commission of a felony under O.C.G.A. §§ 16-5-21(a)(1) and 16-11-106. Clark v. State, 311 Ga. App. 58, 714 S.E.2d 736 (2011).

Evidence that a defendant became highly intoxicated while having visitation with his seven-year-old daughter, that he licked her vagina, kissed her with his tongue in her mouth, and made her rub her hand on his penis was sufficient to support convictions for aggravated child molestation in violation of O.C.G.A. § 16-6-4(c). A jury could infer from the evidence that the defendant's intent was to arouse and satisfy his sexual desires pursuant to O.C.G.A. § 16-2-6. Obeginski v. State, 313 Ga. App. 567, 722 S.E.2d 162 (2012).

**Testimony from nurse as to cause of rape victim's injuries.** — Nurse was properly allowed to testify as to a rape victim's statement to the nurse that her assailant had blindfolded her and pushed her into furniture because the victim's statement to the nurse was given to explain the nature and origin of some of her injuries. The nurse's evidence was sufficient to allow the jury to find that the rape victim had been pushed into furniture as she was pushed and dragged through her home while blindfolded, supporting the defendant's assault convictions. Bryant v. State, 304 Ga. App. 456, 696 S.E.2d 439 (2010).

**Officer's testimony sufficient.**

Evidence that a defendant was seen riding a bicycle after midnight while carrying a tire iron and a black saw case and wearing a new leather tool belt around the defendant's waist, along with the defendant's own statement that the defendant had been working at the address later determined to have been broken into and a tool belt and saw taken, was sufficient to convict the defendant of burglary under O.C.G.A. § 16-7-1, although the defendant fled from police and the stolen items were not recovered. Wilcox v. State, 310 Ga. App. 382, 713 S.E.2d 468 (2011).

**Rule applies only when accomplice is sole witness.**

Defendant's conviction did not rely solely on accomplice testimony, contrary to O.C.G.A. § 24-4-8, because the accomplice's sister testified. White v. State, No. A11A2323; No. A11A2324, 2012 Ga. App. LEXIS 312 (Mar. 21, 2012).

**Corroboration of accomplice not necessary, etc.**

Trial court did not err in denying the codefendant's motion for directed verdict as to the defendant's conviction for misdemeanor theft by shoplifting because no corroboration of accomplice testimony was necessary to support a misdemeanor conviction. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

**Cited** in Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011).

### Who Is an Accomplice

**Association in crime.**

Defendant's convictions were not based on insufficient evidence when a witness gave uncorroborated testimony because the witness was not the defendant's accomplice as: (1) the defendant only asked the witness how to make a fake brick of cocaine; and (2) nothing showed the witness advised, encouraged, or counseled the defendant to commit a crime, under O.C.G.A. § 16-2-20(b)(4), or that the witness intended to participate in a crime. Williams v. State, 289 Ga. 672, 715 S.E.2d 76 (2011).

### Sufficiency of Corroborating Evidence

**Connection of defendant with crime.**

There was sufficient corroboration of the defendant as a perpetrator of the principal crime, and, ultimately, sufficient evidence to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, possession of a firearm during the commission of a felony, and burglary because there was circumstantial evidence to show that the defendant committed a similar transaction after the first incident, that the same gun an accomplice bought and used in the first crime was used in the second crime and ended up in a car at the house of the defendant's mother afterwards, and that the defendant was nervous and felt guilty about events that the defendant participated in with the accomplice, whom the defendant had only known a short time; that corroborative evidence connected the accomplice to the crimes. Ward v. State, 304 Ga. App. 517, 696 S.E.2d 471 (2010).

Any rational trier of fact could have found the defendant guilty of trafficking in cocaine, possession of methylenedioxyamphetamine, and possession of less than one ounce of marijuana beyond a reasonable doubt because based on the evidence, the jury was authorized to conclude that the defendant threw a plastic bag containing drugs out the passenger side window of the defendant's car when the state presented evidence that a deputy saw the defendant actually possessing the bag of illegal narcotics as the defendant held the bag in the car before the defendant threw the bag out the passenger's window; an officer's testimony that the officer saw the defendant's hand on a plastic bag containing cocaine is sufficient to authorize a rationale trier of fact to find that the defendant possessed the cocaine. McCombs v. State, 306 Ga. App. 64, 701 S.E.2d 496 (2010).

Evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of malice murder and related offenses because there was no violation of O.C.G.A. § 24-4-8 since although a co-indictee could be considered an accomplice to murder and the other non-drug-related crimes on which the defendant was tried, there was no evidence of the co-indictee's intent to participate in any crime other than drug trafficking; assuming that the co-indictee was an accomplice, a witness's apparent firsthand knowledge about the crime connected the defendant to the crime and thereby corroborated a co-indictee's testimony identifying the defendant as the shooter. Moore v. State, 288 Ga. 187, 702 S.E.2d 176 (2010).

Defendant's conviction for trafficking in cocaine, in violation of O.C.G.A. § 16-13-31(a)(1), was supported by sufficient evidence under O.C.G.A. §§ 16-2-20(b)(3) and 24-4-8 since the defendant and the codefendant had both made statements regarding the defendant's involvement in the criminal activity, and the police observed the defendant's actions; there was evidence that the defendant was an active participant and a party to the trafficking offense. Martinez v. State, 314 Ga. App. 551, 724 S.E.2d 851 (2012).

**Slight evidence sufficient to prove identity.**

Evidence was sufficient to support the defendant's convictions for armed robbery, burglary, aggravated assault, criminal attempt to commit armed robbery, criminal attempt to commit burglary, and sexual battery because there was at lease slight evidence from sources extraneous to a co-conspirator as to the defendant's identity and participation in a home invasion

and robbery; the co-conspirator testified that the co-conspirator attended a meeting to plan the robbery and that the meeting occurred at the apartment where the defendant resided, and extraneous evidence connected the defendant to at least two home invasions that employed the same modus operandi. Martinez v. State, 306 Ga. App. 512, 702 S.E.2d 747 (2010).

**Testimony of other witnesses sufficient.**

Trial court did not err in convicting the defendant of driving under the influence of alcohol to the extent it was less safe for the defendant to drive, possession of an open container of alcoholic beverage, and disorderly conduct because the testimony of the driver accosted by the defendant and the arresting officer was sufficient to enable a rational jury to find the defendant guilty beyond a reasonable doubt of the charged crimes. Corbin v. State, 305 Ga. App. 768, 700 S.E.2d 868 (2010).

Evidence was sufficient to support the defendant's conviction for forgery because although the only witness who testified to the defendant's participation in the forgery was her boyfriend's daughter, who testified that she and the defendant had together forged counterfeit currency, the trial court found that the daughter's testimony was corroborated by the fact that the counterfeit currency was found in a common area of the house where the defendant was the only resident; the judgment as to the sufficiency of the corroborating evidence was for the finder of fact to determine, and the trial court clearly found that the presumption of possession raised by the defendant's residence at the home was sufficiently corroborative. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010).

Testimony of two codefendants that a defendant was the third man in a burglary was sufficiently corroborated under O.C.G.A. § 24-4-8 because the codefendants corroborated each other, and one codefendant's sibling testified that the sibling lent the three defendants the sibling's car and later noticed the defendant carrying a flat-screen television, which was taken in the burglary. Sims v. State, 306 Ga. App. 68, 701 S.E.2d 534 (2010).

Trial court did not err in denying the defendant's motion for a directed verdict of acquittal on the ground that there was insufficient corroboration of an accomplice's testimony because there was no violation of O.C.G.A. § 24-4-8; the testimony of the victim's fiancée and the accomplice's friend was sufficient to corroborate the accomplice's testimony directly identifying the defendant as the shooter, the physical description of the shooter that the fiancé provided to the police fit the defendant, and the fiancée's description of the shooter's clothes was consistent with the accomplice's trial testimony about what the defendant was wearing on the day of the incident. Johnson v. State, 288 Ga. 803, 708 S.E.2d 331 (2011).

Evidence was sufficient to support a malice murder conviction, although no forensic or physical evidence was presented, because the jury determined that the eyewitnesses' testimony that the defendant fatally shot the victim during a drug transaction was credible. The testimony of a single witness was sufficient pursuant to O.C.G.A. § 24-4-8. Handley v. State, 289 Ga. 786, 716 S.E.2d 176 (2011).

Evidence was sufficient to support a defendant's conviction for aggravated assault. Pursuant to O.C.G.A. § 24-4-8, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, and while the only evidence of the shotgun at the scene of the assault of the victim came from a codefendant, other evidence from the victim and the police served to corroborate it. Emerson v. State, No. A11A1902, 2012 Ga. App. LEXIS 331 (Mar. 23, 2012).

**Corroboration by second accomplice.** — Evidence was sufficient to support the defendant's convictions of armed robbery under O.C.G.A. § 16-8-41(a), aggravated battery under O.C.G.A. § 16-5-24(a), aggravated assault under O.C.G.A.§ 16-5-21(a), burglary under O.C.G.A.§ 16-7-1(a)(2), possession of a firearm during the commission of a felony under O.C.G.A. § 16-11-106(b), and conspiracy to possess cocaine under O.C.G.A. §§ 16-4-8 and 16-13-30(a) as a conspirator because, while the uncorroborated testimony of one accomplice was insufficient under O.C.G.A. § 24-4-8, the evidence sufficed to sustain the defendant's convic-

tion where an additional accomplice provided testimony to corroborate that of the first accomplice. Both codefendants testified that the defendant was present from the robbery's inception through the robbery's execution, that the defendant was aware of the conspiracy to obtain the victim's money and cocaine by armed robbery, and that the defendant willingly participated in the crimes and shared the criminal intent of those who committed the crimes inside the victim's residence by supplying the defendant's car and acting as a get-away driver. Watson v. State, 308 Ga. App. 871, 708 S.E.2d 703 (2011).

**There was adequate corroboration.**

Evidence was sufficient to authorize a rational trier of fact to find the defendants guilty beyond a reasonable doubt of malice murder and aggravated assault because the independent corroborating evidence in the case was substantial; an accomplice's testimony implicating the defendants was corroborated by the aggravated assault victim, who positively identified one of the defendants, that defendant's own admission to a woman in the defendant's apartment, evidence that the second defendant had sustained shotgun wounds on the evening of the crimes, ballistics evidence tying that defendant to the crime scene, and the presence of that defendant's blood on the first defendant's clothing and in the getaway vehicle. Ward v. State, 288 Ga. 641, 706 S.E.2d 430 (2011).

Testimony of the defendant's two accomplices was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of the crimes (murder, armed robbery, and aggravated assault) for which the defendant was convicted. Herbert v. State, 288 Ga. 843, 708 S.E.2d 260 (2011).

Evidence corroborating an accomplice's testimony was sufficient to authorize the jury's determination that the defendant was guilty beyond a reasonable doubt of theft by receiving because in addition to the accomplice's testimony, a deputy with the county sheriff's office observed the accomplice and a codefendant appear to shoplift at a store, after which they got into the defendant's car; the defendant did not stop when police were chasing the defendant but instead continued to drive evasively while the codefendant threw items out of the passenger window, and there were no receipts showing that the items had been purchased. Dixson v. State, 313 Ga. App. 379, 721 S.E.2d 555 (2011).

In an armed robbery prosecution, the testimony of the defendant's accomplice was corroborated as required by O.C.G.A. § 24-4-8, in that the accomplice's testimony regarding the defendant's planning of the crime was corroborated by telephone records, the store's security video tape, and the fact that money was deposited into the defendant's account only two days after the crime. Bell v. State, 314 Ga. App. 28, 722 S.E.2d 871 (2012).

**Adequate corroboration for burglary conviction.**

Defendant's burglary convictions were affirmed based on the defendant's accomplice's testimony that the defendant was present with the accomplice during two of the three burglaries, corroborated by the property owners' testimony that items were stolen during unauthorized entries into their respective residences, evidence that the stolen items were found in the defendant's bedroom shortly thereafter, and the defendant's inconsistent explanations for the defendant's possession of the stolen items. Mays v. State, 306 Ga. App. 507, 703 S.E.2d 21 (2010).

**Adequate corroboration for armed robbery conviction.**

While no witness could specifically identify the dark clothes that were recovered by the police from the crawl space of the defendant's parent as having been worn by one of the robbers of a grocery store, these articles of clothing matched descriptions given to an officer that the two suspects wore dark attire with full sleeves. This evidence sufficiently corroborated an accomplice's testimony that the defendant participated in the robbery. Jupiter v. State, 308 Ga. App. 386, 707 S.E.2d 592 (2011).

Trial court did not err in denying the defendant's motion for directed verdict after the defendant was convicted of armed robbery because there was no violation of O.C.G.A. § 24-4-8 since there was evidence from which a jury could find sufficient corroboration of the accomplice's

testimony to support the defendant's conviction; the testimony of the victims corroborated the accomplice's testimony because the victims physical description of the perpetrator was consistent with the accomplice's testimony about what the defendant was wearing on the day of the robbery. Harris v. State, 311 Ga. App. 336, 715 S.E.2d 757 (2011).

**Adequate corroboration for cocaine conviction.**

Defendant's accomplice's testimony that the defendant was knowingly in possession of cocaine found in their vehicle was corroborated by evidence of 575 grams of cocaine in the vehicle, that the defendant was extremely anxious when stopped by police, and the fact that there were 18 air fresheners hung throughout the vehicle, and was therefore sufficiently corroborated under O.C.G.A. § 24-4-8, supporting the defendant's conviction for trafficking in cocaine in violation of O.C.G.A. § 16-13-31(a)(1). Richardson v. State, 305 Ga. App. 850, 700 S.E.2d 738 (2010).

**Testimony of victim sufficient to corroborate accomplice's testimony.**

Although under Georgia law, a defendant could not be convicted solely upon the uncorroborated testimony of an accomplice, O.C.G.A. § 24-4-8, the evidence corroborated some particulars of the accomplice's testimony implicating the codefendants in the charged crimes since all three of the victims from the three separate gas stations provided descriptions of their assailants that generally matched the codefendants and the accomplice, and all three victims also testified that their assailants brandished a handgun and a shotgun, which were indeed the weapons that were found at the scene where the stolen SUV crashed and where the accomplice was arrested. Accordingly, the evidence corroborating the accomplice's testimony was sufficient to authorize the jury's determination that the codefendants were guilty beyond a reasonable doubt as parties to armed robbery, O.C.G.A. § 16-8-41, hijacking a motor vehicle, O.C.G.A. § 16-5-44.1, aggravated assault, O.C.G.A. § 16-5-21, theft by taking, O.C.G.A. § 16-8-2, theft by receiving, O.C.G.A. § 16-8-7, and possession of a firearm during the commission of a felony, O.C.G.A. § 16-11-106. Daniels v. State, 306 Ga. App. 577, 703 S.E.2d 41 (2010).

**Testimony of defendant sufficient to corroborate accomplice's testimony.**

There was sufficient corroboration of an accomplice's testimony as required under O.C.G.A. § 24-4-8 based on the defendant's own testimony admitting that the defendant deliberately drove to the scene of the murder and shooting with others, knew that the men doing the shooting were armed, and moved to the crime scene rather than away from the scene. Laye v. State, 312 Ga. App. 862, 720 S.E.2d 233 (2011), cert. denied, 2012 Ga. LEXIS 280 (Ga. 2012).

**Identification by robbery victim.**

Evidence was sufficient to support the defendant's conviction for armed robbery in violation of O.C.G.A. § 16-8-41 and possession of a firearm during the commission of a felony in violation of O.C.G.A. § 16-11-106(b)(1) because even though the defendant was found near a car similar to that involved in the robbery, with a shotgun similar to that used in the attack, and the defendant admitted being present at the scene of the robbery, the victim's testimony alone was sufficient to authorize the jury's verdict of guilty beyond a reasonable doubt pursuant to O.C.G.A. § 24-4-8. Law v. State, 308 Ga. App. 76, 706 S.E.2d 604 (2011).

### Evidence Constituting Corroboration

**Testimony and cell phone records sufficient corroboration.** — Defendant's convictions of malice murder, armed robbery, and other crimes were not based on the uncorroborated testimony of an accomplice in violation of O.C.G.A. § 24-4-8 as: 1) a victim testified that intruders took a wallet that police later found in the defendant's home; and 2) cell phone tower records established that the defendant and the accomplice were exchanging phone calls during the times when the crimes were committed and within the vicinity of the crime sites. Jackson v. State, 289 Ga. 798, 716 S.E.2d 188 (2011).

**Adequate corroboration for gang related beating.** — In addition to an

accomplice's testimony linking the defendants to the beatings of the victims, there was evidence that one defendant was involved in a conversation about retribution, that the defendant was near the exit to an amusement park among the larger group shortly before the assault, and that the defendant rode home in a car with an admitted participant in the beating. Morey v. State, 312 Ga. App. 678, 719 S.E.2d 504 (2011).

### Perjury

**Conspirator's testimony sufficient.** — Trial court did not err in denying the defendant's motion for a directed verdict of acquittal because the state presented sufficient evidence to corroborate a coconspirator's testimony under O.C.G.A. § 24-4-8 and for the jury to find beyond a reasonable doubt that the defendant committed the crimes for which the defendant was convicted; the state presented the testimony of numerous witnesses and other evidence that sufficiently corroborated the coconspirator's testimony about the defendant's participation in the crimes. Walker v. State, 310 Ga. App. 223, 713 S.E.2d 413 (2011).

### Jury

**Jury instruction proper.**

Trial counsel was not ineffective for failing to object to a jury charge that the testimony of a single witness, if believed, was generally sufficient to establish a fact because the trial court did not err in giving the charge. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

Trial court did not err by charging the jury that the testimony of a single witness, if believed, was generally sufficient to establish a fact because the first sentence of O.C.G.A. § 24-4-8 was not a truism that the jury could only be instructed on when the case involved one of the exceptions. Bellamy v. State, 312 Ga. App. 899, 720 S.E.2d 323 (2011).

## ARTICLE 2

## PRESUMPTIONS AND ESTOPPEL

## 24-4-21. (Effective until January 1, 2013) Rebuttable presumptions of law.

### JUDICIAL DECISIONS

Analysis

Insanity

### Insanity

**Continuation of insanity.** — Trial court erred in denying a recommendation filed by the Department of Behavioral Health with Developmental Disabilities that a patient be moved to a group home for outpatient involuntary treatment because the preponderance of the evidence supported a finding that the patient overcame the presumption under O.C.G.A. § 24-4-21 of a continued need for inpatient involuntary treatment, and there was no evidence to support the trial court's finding that under O.C.G.A. § 37-3-1(9.1), the patient posed a substantial risk of imminent harm to the patient or others or was so unable to care for the patient's own physical health and safety as to create an imminently life-endangering crisis; the group home would have only two other suitable patient occupants, both of whom would be under the supervision of live-in supervisors and would have little opportunity to pressure the patient into misconduct, the patient would not be permitted to leave the group home unsupervised, the manager of the group home testified that as soon as patients were admitted into the group home and evaluated, an individualized service plan was created, and there was no statutory requirement that a plan

exist prior to release. Nelor v. State, 309 Ga. App. 165, 709 S.E.2d 904 (2011).

## 24-4-22. (Effective until January 1, 2013) Presumption from failure to produce evidence.

### JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

#### General Consideration

**No evidence held back.**

Trial court did not err when the court failed to preclude defendants from putting on evidence that contradicted an estate administrator's version of events due to the defendants' alleged failure to produce a video recording of a parking lot where an incident occurred pursuant to O.C.G.A. § 24-4-22 as the administrator waived that claim. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011).

**Charge demanding inference.**

There was no reversible error shown in the trial court's exercise of its discretion to charge the jury on the rebuttable presumption arising from spoliation, as opposed to instructing the jury that it had to accept as true an estate administrator's description of a fatal assault on the administrator's decedent, as there was no authority cited that mandated the former instruction in the circumstances. Pacheco v. Regal Cinemas, Inc., 311 Ga. App. 224, 715 S.E.2d 728 (2011).

**Cited** in Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010).

## 24-4-23. (Effective until January 1, 2013) Presumption from failure to answer business letter.

### JUDICIAL DECISIONS

**Settlement agreement.** — Trial court erred in granting the insureds' motion to enforce a settlement agreement a parent and an administrator allegedly reached with an insurer because the insurer's tender was not sufficient to constitute acceptance of the settlement offer; the attorney for the mother and the administrator was not silent but stated the intent to consult with the parent and the administrator, the attorney committed to no deadline for responding, and the terms of the offer were in writing and equally known to all parties. Kitchens v. Ezell, No. A11A1242, 2012 Ga. App. LEXIS 290 (Mar. 16, 2012).

## 24-4-24. (Effective until January 1, 2013) Estoppels defined; enumeration generally.

### JUDICIAL DECISIONS

ANALYSIS

EQUITABLE ESTOPPEL

2. ESTOPPEL BY OTHER CONDUCT

**Equitable Estoppel**

**2. Estoppel by Other Conduct**

**Insufficient evidence of equitable estoppel.**

Court of appeals correctly reversed a trial court's grant of summary judgment to a driver and a corporation, which was based on a second driver's lack of diligence in serving the second driver's personal injury complaint in the driver's voluntarily dismissed original action because that driver was not equitably estopped from proceeding with the second driver's renewal action; the first driver and corporation did not allege an affirmative act of deception, and to the extent that the second driver had a duty to speak to them, it was to inform them of the lawsuit, but that duty was defined by the Georgia Code, which included the renewal statute, O.C.G.A. § 9-2-61. Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010).

## 24-4-27. (Effective until January 1, 2013) Equitable estoppel.

**JUDICIAL DECISIONS**

Analysis

General Consideration

**General Consideration**

**Cited** in Robinson v. Boyd, 288 Ga. 53, 701 S.E.2d 165 (2010); Griffin v. State Bank, 312 Ga. App. 87, 718 S.E.2d 35 (2011).

# ARTICLE 3

# PARTICULAR MATTERS OF PROOF

## 24-4-40. (Effective until January 1, 2013) Evidence of identity; burden in civil actions.

**JUDICIAL DECISIONS**

**Concordance of name, etc.**

Trial court did not err in admitting similar transaction evidence because the prior armed robbery victim's identification of the defendant as one of the robbers was based on an investigating officer's personal knowledge; a second police officer's testimony that the officer had arrested a man with the same name as the defendant with a date of birth of February 23, 1984 was sufficient circumstantial evidence that the defendant committed a motor vehicle theft in 1998. Smith v. State, 304 Ga. App. 708, 699 S.E.2d 742 (2010).

## 24-4-48. (Effective until January 1, 2013) Admissibility of photographs, motion pictures, videotapes, and audio recordings.

**JUDICIAL DECISIONS**

Analysis

Photos

### Photos

**Proper foundation for admission of photo.**

It was within the broad discretion of the trial court to allow photographs to be introduced to show the locations of two docks during the time frames testified to by a landowner because notwithstanding that the witness who obtained the photographs did not have the exact same aerial view as the tendered photographs, the witness explained the basis for the testimony as to the date of the photographs and testified that the photographs accurately depicted those locations as of those time periods. Dillon v. Reid, 312 Ga. App. 34, 717 S.E.2d 542 (2011).

## ARTICLE 4

## DNA ANALYSIS UPON CONVICTION OF CERTAIN SEX OFFENSES

### 24-4-60 through 24-4-65. Redesignated.

**Editor's notes.** — Ga. L. 2011, p. 264, § 2-1, effective May 11, 2011, redesignated former Code Sections 24-4-60 through 24-4-65 as present Code Sections 35-3-160 through 35-3-165, respectively.

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# CHAPTER 5

# BEST EVIDENCE RULE

## ARTICLE 1

## GENERAL PROVISIONS

### 24-5-2. (Effective until January 1, 2013) Showing to admit secondary evidence.

#### JUDICIAL DECISIONS

Analysis

General Consideration

### General Consideration

**Perjury proven through witness testimony.** — Since an original record of the trial during which the perjury with which the defendant was charged occurred was unavailable and could not be produced despite the exercise of the state's due diligence, the state was authorized to prove the defendant's perjured testimony through witness testimony pursuant to O.C.G.A. § 24-5-2. Walker v. State, No. A11A2293, 2012 Ga. App. LEXIS 193 (Feb. 24, 2012).

## 24-5-4. (Effective until January 1, 2013) Best evidence of writing to be produced or accounted for.

### JUDICIAL DECISIONS

Analysis



#### General Consideration

**Inadmissible testimony.**

Trial court erred in excluding the testimony of the defendant's parent concerning a missing letter written to the parent by the codefendant because testimony regarding the letter was inadmissible under the best evidence rule, O.C.G.A. § 24-5-4; because the parent was not so familiar with the defendant's handwriting that the parent would recognize the handwriting, and there was no other evidence that the letter the parent described was written by the codefendant, the letter was not properly authenticated. Norris v. State, 289 Ga. 154, 709 S.E.2d 792 (2011).

**Inadmissible evidence.**

Guarantors' claims that the guarantors entered into written agreements with a bank releasing the guarantors from their guaranty agreements was not supported by any evidence; there was nothing to satisfactorily account for the absence of the written agreements, O.C.G.A. § 24-5-4(a), and any oral assurances by bank personnel were inadmissible to vary from the terms of the guaranty agreements under O.C.G.A. § 13-2-2(1). Windham & Windham, Inc. v. Suntrust Bank, 313 Ga. App. 841, 723 S.E.2d 70 (2012).

#### What Constitutes Best Evidence

**Testimony of investigator as to contents of missing affidavits.** — Trial court did not err when the court denied the defendant's motion to suppress even though the unsigned, unsworn document an investigator identified as the investigator's unsigned affidavit presented at the suppression hearing did not qualify as a "duplicate original" under Georgia law since the affidavit was not made by the same pen stroke at the same time or was not a copy executed at the same time as the "original" of the document; in light of an investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse the court's discretion when the court admitted secondary evidence under O.C.G.A. § 24-5-21, i.e., the testimony of the investigator as to the contents of the missing affidavits. Baptiste v. State, 288 Ga. 653, 706 S.E.2d 442 (2011).

# ARTICLE 2

# COPIES OF WRITINGS

## 24-5-21. (Effective until January 1, 2013) When secondary evidence admitted; diligence.

### JUDICIAL DECISIONS

**Testimony of investigator as to contents of missing affidavits.** — Trial court did not err when the court denied the defendant's motion to suppress even though the unsigned, unsworn document an investigator identified as the investigator's unsigned affidavit presented at the suppression hearing did not qualify as a "duplicate original" under Georgia law since the affidavit was not made by the same pen stroke at the same time or was not a copy executed at the same time as

the "original" of the document; in light of an investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse the court's discretion when the court admitted secondary evidence under O.C.G.A. § 24-5-21, i.e., the testimony of the investigator as to the contents of the missing affidavits. Baptiste v. State, 288 Ga. 653, 706 S.E.2d 442 (2011).

### 24-5-26. (Effective until January 1, 2013) Reproductions made in regular course of business admissible; when enlargements or facsimiles admitted.

#### JUDICIAL DECISIONS

**Cited** in Karle v. Belle, 310 Ga. App. 115, 712 S.E.2d 96 (2011).

### 24-5-31. (Effective until January 1, 2013) Authenticated copies of judicial records and probated wills as primary evidence; other copies secondary evidence.

#### JUDICIAL DECISIONS

**Evidence held admissible.** — Since an original record of the trial during which the perjury with which the defendant was charged occurred was unavailable and could not be produced despite the exercise of the state's due diligence, as required by O.C.G.A. § 24-5-31, the state was authorized to prove the defendant's perjured testimony through witness testimony pursuant to O.C.G.A. § 24-5-2. Walker v. State, No. A11A2293, 2012 Ga. App. LEXIS 193 (Feb. 24, 2012).

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## CHAPTER 6

## PAROL EVIDENCE RULE

### 24-6-3. (Effective until January 1, 2013) Contemporaneous writings explaining each other; parol evidence explaining ambiguities.

#### JUDICIAL DECISIONS

Analysis

Writings Explaining Each Other

**Writings Explaining Each Other**

**Documents properly construed together.**

As the evidence supported a finding that the defendant freely and voluntarily consented to a special condition in a bond, allowing a warrantless search of the defendant's residence, denial of suppression with respect to drugs and a bandgun seized during the search was proper as was the finding that the defendant had

waived rights under U.S. Const., amend. IV; the special condition form was considered along with the bond order as the documents had been executed contemporaneously pursuant to O.C.G.A. § 24-6-3(a). Curry v. State, 309 Ga. App. 338, 711 S.E.2d 314 (2011).

Trial court erred in granting a flea market operator and a property owner summary judgment in their slander of title action against a real estate investment firm and the estate of the firm's sole member because there was a genuine issue of material fact as to whether the firm was a party to the sales contract entered into between the operator and the member since at the time the sales contract was executed contemporaneously with the promissory note and deed to secure debt, the member executed an affidavit of filing claiming specifically that the firm had a vested interest in the property pursuant to the sales contract; that affidavit was recorded along with the contract as an attachment, and the contemporaneous filings, considered together under O.C.G.A. § 24-6-3, created an ambiguity as to whether the member signed the sales contract in a personal or corporate capacity. Shiva Mgmt., LLC v. Walker, 308 Ga. App. 878, 708 S.E.2d 710 (2011).

Statute of frauds did not bar a landlord's claim on a guaranty because the guaranty identified the debt, and the assignment contemplated in the guaranty was documented by a written agreement; the guaranty and the assignment, along with an amendment, could be read together to determine whether the guaranty complied with the statute of frauds, and when read together the documents identified the principal debt as required by the statute of frauds. Patterson v. Bennett St. Props., No. A11A1964, 2012 Ga. App. LEXIS 299 (Mar. 19, 2012).

**Consent judgment.** — Trial court erred in determining that a corporation was not a party to a consent judgment because the consent judgment was ambiguous, and the provision stating that judgment was not entered against the corporation "at this time" since the corporation was in bankruptcy implied that the entry of judgment was contemplated at a later time; the surrounding circumstances showed that the corporation filed a dismissal of the corporation's counterclaim with prejudice contemporaneously with the filing of the consent judgment, thereby manifesting an understanding that the corporation was included in, and obligated by, the consent judgment, and the corporation was listed as a defendant in the style of the case on the face of the consent judgment. Duke Galish, LLC v. Manton, 308 Ga. App. 316, 707 S.E.2d 555 (2011).

**Contemporaneous writing rule inapplicable to credit application.** — Guaranty a principal executed as part of a credit application was unenforceable under the statute of frauds, O.C.G.A. § 13-5-30, because the guaranty failed to identify the principle debtor, and the application was unsigned, rendering the contemporaneous writing rule under O.C.G.A. § 24-6-3(a) inapplicable; because there was nothing in the application reflecting that the principal and a supplier formed a binding contract regarding the extension of credit, the supplier would have to introduce parol evidence to establish that the application was entered into at the same time and in the course of the same transaction as the guaranty, and such evidence was not permitted in that context. LaFarge Bldg. Materials, Inc. v. Pratt, 307 Ga. App. 767, 706 S.E.2d 131 (2011).

**Integration clause precluded consideration of parol evidence.** — Court of appeals could not consider parol evidence to add to, take from, contradict, or vary an assignment contract containing the terms of an estoppel certificate because the contract's integration clause provided that the consent to assignment and all its exhibits, including the estoppel certificate, constituted the entire agreement of the parties and that all prior understandings and agreements among the parties concerning the matters were merged into the consent. Fundus Am. (Atlanta) L.P. v. RHOC Consolidation, LLC, 313 Ga. App. 118, 720 S.E.2d 176 (2011).

### 24-6-7. (Effective until January 1, 2013) Proof of mistake in deed or written contract.

#### JUDICIAL DECISIONS

**Parol evidence admissible.**
Trial court erred in granting a bank's motion for summary judgment in the bank's action for breach of a guaranty because parol testimony was admissible and created a genuine issue of material fact over whether the guaranty was executed after the bank had already extended credit to the underlying debtor, and thus over whether the guaranty was void for lack of consideration; as in the context of a deed, a witness is entitled to offer parol testimony that the guaranty was executed on a date other than the date inserted on the guaranty. Helton v. Jasper Banking Co., 311 Ga. App. 363, 715 S.E.2d 765 (2011).

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## CHAPTER 7

## AUTHENTICATION OF WRITINGS

### ARTICLE 1

### IN GENERAL

### 24-7-1. (Effective until January 1, 2013) Production of writing and proof of execution required generally.

#### RESEARCH REFERENCES

**ALR.** — Authentication of electronically stored evidence, including text messages and e-mail, 45 ALR4th 602.
Authentication and admission of foreign business records in federal criminal proceeding pursuant to 18 USCS § 3505. 41 ALR Fed. 2d 537.

### 24-7-3. (Effective until January 1, 2013) When necessity of proof dispensed with.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-7-4. (Effective until January 1, 2013) Subscribing witnesses to be produced; exceptions.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

## 24-7-5. (Effective until January 1, 2013) Proof of execution where subscribing witnesses inaccessible; primary evidence; secondary evidence.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

## 24-7-6. (Effective until January 1, 2013) Proof of handwriting.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

# ARTICLE 2

# PUBLIC RECORDS

## 24-7-20. (Effective until January 1, 2013) Exemplifications — By state or county officers.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### JUDICIAL DECISIONS

ANALYSIS

TREATMENT OF SPECIFIC RECORDS

**Treatment of Specific Records**

**Driver's license.** — Because a defendant's driver's license was a properly certified public record, the trial court was permitted to infer the reliability of any hearsay contained therein and to conclude that no confrontation clause violation had been shown, pursuant to O.C.G.A. §§ 24-3-17 and 24-7-20. Douglas v. State, 312 Ga. App. 585, 718 S.E.2d 908 (2011).

### RESEARCH REFERENCES

**ALR.** — Authentication of electronically stored evidence, including text messages and e-mail, 45 ALR4th 602.

## 24-7-21. (Effective until January 1, 2013) Exemplifications — Of municipal records and minutes.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### RESEARCH REFERENCES

**ALR.** — Authentication of electronically stored evidence, including text messages and e-mail, 45 ALR4th 602.

### 24-7-24. (Effective until January 1, 2013) Proof of laws and judicial records of other states, territories, or possessions; full faith and credit.

#### JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

#### General Consideration

**Georgia law applies in absence of proof of foreign law.**

Georgia law applied in an action arising out of a Louisiana divorce decree because neither party met the requirements in O.C.G.A. §§ 9-11-43(c) and 24-7-24 that the parties give notice and thereafter prove the law of another state. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

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## CHAPTER 8

## ESTABLISHMENT OF LOST RECORDS

### ARTICLE 1

### PUBLIC RECORDS

### 24-8-1. (Effective until January 1, 2013) Establishment of lost records in superior court — Authorization; use as evidence.

#### JUDICIAL DECISIONS

**Copy of zoning ordinance.**

Trial court erred in holding that a decision establishing a copy of a lost zoning ordinance under O.C.G.A. § 24-8-1 rendered moot any issue regarding the validity of the process used by a county to enact the original zoning ordinance because the sole object of § 24-8-1 was to restore the record as the record existed, regardless of the record's validity. East Ga. Land & Dev. Co., LLC v. Newton County, 290 Ga. 732, 723 S.E.2d 909 (2012).

# CHAPTER 9

# WITNESSES GENERALLY



## ARTICLE 1

## COMPETENCY

### 24-9-5. (Effective until January 1, 2013) Competency of persons without use of reason.

#### JUDICIAL DECISIONS

Analysis

Children

#### Children

**Examination sufficient.**

Defense counsel was not ineffective for falling to challenge the competency of child witnesses because both victims were asked to demonstrate their understanding of the difference between the truth and a lie and both stated that they would tell the truth; the defendant gave no basis upon which, had defense counsel challenged their competency, the trial court would have ruled the children incompetent to testify, and defense counsel was not required to make a meritless objection. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

## ARTICLE 2

## PRIVILEGE

### Part 1

### General Provisions

### 24-9-20. (Effective until January 1, 2013) Testimony of criminal defendant.

#### JUDICIAL DECISIONS

Analysis

General Consideration

### General Consideration

**Right to testify does not apply to hearing on motion to withdraw guilty plea.** — Trial court did not deny the defendant's constitutional right to testify on the defendant's own behalf at the hearing on the defendant's motion to withdraw the defendant's guilty plea because the right to testify applied to a trial on the question of guilt or innocence, not to a hearing on a motion to withdraw a guilty plea. Lavendar v. State, 306 Ga. App. 257, 701 S.E.2d 892 (2010).

### Self-Incrimination

#### 1. In General

**Breath test results.**
Trial court did not err in admitting the results of the defendant's portable alco-sensor test because even though the defendant was in custody for purposes of Miranda, the portable test was administered in response to a demand from the defendant, not the officer; thus, the situation was more akin to a spontaneous outburst from an unwarned suspect or a test conducted pursuant to the Georgia Implied Consent Statute, O.C.G.A. § 40-6-392. Hale v. State, 310 Ga. App. 363, 714 S.E.2d 19 (2011).

**Database match of DNA profile admissible.** — Testimony concerning a CODIS database match of the defendant's DNA profile was relevant and admissible because the DNA evidence did not, in and of itself, constitute impermissible character evidence since no reference was made as to why the matching sample was collected or stored and no reference was made linking the defendant's DNA profile to other criminal activity. Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (2011).

#### 2. Compelling Evidence

**Blood and urine analysis admissible.** — Admitting the results of blood and urine analysis into evidence in the defendant's felony murder trial did not violate U.S. Const., amend. V, Ga. Const. 1983, Art. I, Sec. I, Para. XVI, or O.C.G.A. § 24-9-20(a) because the removal of a substance from the body through a minor intrusion did not cause the defendant to be a witness against oneself within the meaning of the Fifth Amendment and similar provisions of Georgia law. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190 (2011).

#### 3. Comments

**Prosecutor's comments were not on defendant's silence.** — Counsel's failure to object to the prosecutor's comments on the ground that the prosecutor improperly commented on the defendant's exercise of the defendant's right to remain silent by remarking on the defendant's failure to testify at trial did not amount to deficient performance because the challenged remarks were not improper; the prosecutor made the comments while seeking to persuade the jury that the defendant's statements and behavior shortly after the crimes were inconsistent with the defendant's theory of self-defense, and the remarks were not intended to comment on the defendant's failure to testify or would have been received as such by the jury. Lacey v. State, 288 Ga. 341, 703 S.E.2d 617 (2010).

### Evidence of Character or Other Crimes

#### 2. Putting Character in Issue

**Defense counsel opening door.**
While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions, when defense counsel opened the door to asking about the defendant's being in trouble before, the prosecutor could then

impeach the defendant with other convictions that the defendant neglected to mention. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

**Harmless error.**

It was error for the trial court to refuse to charge the jury on impeachment by prior conviction for a crime of moral turpitude because the inmate who testified to the defendant's jailhouse confession was a convicted felon; however, the error was harmless because even disregarding the inmate's testimony, the evidence of defendant's guilt was overwhelming, and the trial court gave the pattern jury instruction on credibility. Brown v. State, 289 Ga. 259, 710 S.E.2d 751 (2011), cert. denied, U.S. , 132 S. Ct. 524, 181 L. Ed. 2d 368 (2011).

### 3. Use of Evidence of Other Crimes

**Evidence of incarceration admissible.**

Under O.C.G.A. § 24-9-20(b), state did not elicit improper character evidence from the defendant regarding the defendant's prior incarceration during cross-examination because the defendant mentioned the prior incarceration during the defendant's testimony. Baker v. State, 307 Ga. App. 884, 706 S.E.2d 214 (2011), cert. denied, No. S11C0940, 2011 Ga. LEXIS 517 (Ga. 2011).

### Treatment of Defendant as Witness

**Impeachment generally.**

Trial court did not err by allowing the state to question the defendant regarding a prior domestic dispute with the defendant's wife because under O.C.G.A. § 24-9-20(b), the trial court properly allowed the state to confront the defendant with evidence that the defendant beat the wife after an argument in order to impeach the defendant's testimony on direct that the defendant did not beat women with whom the defendant argued. Ridley v. State, 725 S.E.2d 223, No. S11A1416, 2012 Ga. LEXIS 252 (2012).

## 24-9-21. (Effective until January 1, 2013) Confidentiality of certain communications.

### JUDICIAL DECISIONS

Analysis

General Consideration
Communications Between Attorney and Client
Communications Between Psychiatrist and Patient

### General Consideration

**Confidential informants.**

Pursuant to O.C.G.A. §§ 24-9-21 and 24-9-27, the trial court correctly denied the defendant's motion to reveal a confidential informant's identity because the informant was a mere tipster; while the informant saw the victim and the defendant interact prior to entering a wooded area, the informant did not witness the actual rape, the offense forming the basis of the defendant's prosecution, and was not a participant in the attack. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

### Communications Between Attorney and Client

**E-mails within attorney-client privilege.** — Trial court did not abuse the court's discretion in ordering a law firm and the firm's attorneys to return certain documents to the firm's former clients because the law firm and attorneys produced no evidence showing that the clients waived the clients' attorney-client privilege; the disclosure of e-mails containing communications from the clients' attorney in managers' litigation concerning the issue of damages during document production by counsel did not preclude

later objection to the documents use by the clients. Alston & Bird LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652 (2010).

**Communications Between Psychiatrist and Patient**

**Communication with mental health professional.** — Trial court erred in requiring a plaintiff to produce any confidential communications made between the plaintiff and the plaintiff's mental-health-care providers because the plaintiff's handling of discovery, albeit troublesome, did not amount to a decisive and unequivocal waiver of the plaintiff's mental-health privilege as the law required; the plaintiff's arguably misleading responses to opposing counsel's questions regarding a previous diagnosis of depression did not amount to a "decisive" and "unequivocal" waiver of the mental-health privilege, and the plaintiff's decision to answer the deposition question posed to the plaintiff (whether the plaintiff suffered from a history of depression), rather than object to it at the time the issue of depression was raised, did not constitute an explicit waiver of the privilege. Mincey v. Ga. Dep't of Cmty. Affairs, 308 Ga. App. 740, 708 S.E.2d 644 (2011).

**RESEARCH REFERENCES**

**ALR.** — Construction and application of fiduciary duty exception to attorney-client privilege, 47 ALR6th 255.

## 24-9-22. (Effective until January 1, 2013) Communications to clergyman privileged.

**JUDICIAL DECISIONS**

**Waiver of privilege.**

Because defendant requested the future assistance of an attorney, not immediate assistance, and because defendant knew that defendant's confession would be handed over to law enforcement, the clergy-parishioner privilege in O.C.G.A. §§ 24-3-51 and 24-9-22 was inapplicable; therefore, defendant's confession to the crimes was voluntary. Willis v. State, 287 Ga. 703, 699 S.E.2d 1 (2010).

## 24-9-23. (Effective until January 1, 2013) Compellability of testimony by defendant's spouse.

**JUDICIAL DECISIONS**

**That defendant not compelled to testify not safeguarded by statute.** — Trial court did not err in denying the defendant's motion to sever her trial from that of her husband because the defendant made no showing that the denial of the motion forced her to choose between her right to a defense and her spousal privilege, O.C.G.A. § 24-9-23; the defendant argued that she was compelled not to testify, which was not safeguarded by § 24-9-23 and was not a denial of due process, and there was nothing confusing about the evidence and no danger that the evidence against the husband would be considered against the defendant. Holland v. State, 310 Ga. App. 623, 714 S.E.2d 126 (2011).

**Testimony when spouse is charged with a crime against a minor child.**

Trial court did not err in ruling that the state could compel the defendant's wife to testify even though she was not a witness to the specific act charged, child molestation, because the wife testified that she did not know that the defendant had been applying ointment to the victim, and that evidence was sufficiently relevant to the

molestation acts charged against the defendant so that the wife's testimony was compellable under O.C.G.A. § 24-9-23(b). O'Neal v. State, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

## 24-9-24. (Effective until January 1, 2013) Client's communications to attorney privileged.

### JUDICIAL DECISIONS

Analysis

Communications
Waiver

#### Communications

**E-mails within attorney-client privilege.** — Trial court did not abuse the court's discretion in ordering a law firm and the firm's attorneys to return certain documents to the firm's former clients because the law firm and attorneys produced no evidence showing that the clients waived the clients' attorney-client privilege; the disclosure of e-mails containing communications from the clients' attorney in managers' litigation concerning the issue of damages during document production by counsel did not preclude later objection to the documents use by the clients. Alston & Bird LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652 (2010).

#### Waiver

**Presence of third party.**

Defendant's conversation with the defendant's attorney, made through a three-way call by the defendant's girlfriend and recorded at the jail, were admissible and not privileged under O.C.G.A. § 24-9-24 because the defendant's girlfriend remained on the call and the telephone had signs and a message indicating that calls could be recorded. Rogers v. State, 290 Ga. 18, 717 S.E.2d 629 (2011).

### RESEARCH REFERENCES

**ALR.** — Construction and application of fiduciary duty exception to attorney-client privilege, 47 ALR6th 255.

## 24-9-25. (Effective until January 1, 2013) When attorney may testify for or against client.

### JUDICIAL DECISIONS

Analysis

Application in Specific Actions

#### Application in Specific Actions

**E-mails within attorney-client privilege.** — Trial court did not abuse the court's discretion in ordering a law firm and the firm's attorneys to return certain documents to the firm's former clients because the law firm and attorneys produced no evidence showing that the clients waived the clients' attorney-client privilege; the disclosure of e-mails containing communications from the clients' attorney in managers' litigation concerning the issue of damages during document production by counsel did not preclude later objection to the documents use by

the clients. Alston & Bird LLP v. Mellon Ventures II, L.P., 307 Ga. App. 640, 706 S.E.2d 652 (2010).

### RESEARCH REFERENCES

**ALR.** — Construction and application of fiduciary duty exception to attorney-client privilege, 47 ALR6th 255.

## 24-9-27. (Effective until January 1, 2013) Privilege of parties and witnesses; public officials.

### JUDICIAL DECISIONS

ANALYSIS

STATE MATTERS

#### State Matters

**Disclosure not warranted if informant is mere tipster.**

Pursuant to O.C.G.A. §§ 24-9-21 and 24-9-27, the trial court correctly denied the defendant's motion to reveal a confidential informant's identity because the informant was a mere tipster; while the informant saw the victim and the defendant interact prior to entering a wooded area, the informant did not witness the actual rape, the offense forming the basis of the defendant's prosecution, and was not a participant in the attack. Strozier v. State, 314 Ga. App. 432, 724 S.E.2d 446 (2012).

## 24-9-28. (Effective until January 1, 2013) Grant of immunity; refusal to testify treated as contempt.

### JUDICIAL DECISIONS

ANALYSIS

GRANT OF IMMUNITY

#### Grant of Immunity

**Prosecutor has the power to forego prosecution, etc.**

District attorney, not the trial court, had the discretion to grant immunity to witnesses for the state and there was no provision under which the trial court could have granted immunity to a jail inmate so the inmate could testify as a defense witness in a defendant's attempted armed robbery trial. Dennard v. State, 313 Ga. App. 419, 721 S.E.2d 610 (2011).

PART 2

MEDICAL INFORMATION

**24-9-40. (Effective until January 1, 2013) When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.**

(a) No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of the state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Public Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to Code Section 31-12-2 and where authorized or required by law, statute, or lawful regulation or to the Department of Community Health, its divisions, agents, or successors where authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any civil or criminal proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

(b) No pharmacist licensed under Chapter 4 of Title 26 shall be required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any administrative, civil, or criminal proceeding. (Code 1933, § 38-418; Ga. L. 1978, p. 1657, § 1;

Ga. L. 1982, p. 1077, §§ 1, 3; Ga. L. 1986, p. 1277, § 3; Ga. L. 1993, p. 1050, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 5-5/HB 214.)

**The 2011 amendment,** effective July 1, 2011, in subsection (a), in the first sentence, substituted "Department of Public Health" for "Department of Community Health" near the beginning, inserted "or to the Department of Community Health, its divisions, agents, or successors where authorized or required by law, statute, or lawful regulation" near the middle, and inserted "or her" in two places near the end.

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 147 (2011).

## JUDICIAL DECISIONS

**Ex parte communications between defense counsel and medical provider.** — O.C.G.A. § 34-9-207, requiring an employee to furnish medical "information" for purposes of a workers' compensation claim, did not compel the employee to authorize the employee's treating physician to talk to the employer's lawyer ex parte in exchange for receiving benefits for a compensable injury. The Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. § 164.500 et seq., applied. McRae v. Arby's Rest. Group, 313 Ga. App. 313, 721 S.E.2d 602 (2011).

**Protective order under HIPAA.** — Trial court did not err in granting a hospital's motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to conduct ex parte interviews with a patient's health care providers because the hospital complied with 45 C.F.R. § 164.512(e)(1)(ii)(B), and any ex parte interviews conducted pursuant to the qualified protective order would be permitted under the HIPAA; because the order prohibited the use or disclosure of the patient's health information for purposes other than the litigation and required the return or destruction thereof at the conclusion of proceedings, it constituted a qualified protective order as defined in § 164.512(e)(1)(v). Baker v. Wellstar Health Sys., 288 Ga. 336, 703 S.E.2d 601 (2010).

In issuing orders authorizing ex parte interviews, trial courts should state with particularity: (1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary; in addition, when issuing or modifying such orders, trial courts should consider whether the circumstances, including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds, warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request because the use of carefully crafted orders specifying precise parameters within which ex parte interviews may be conducted will serve to enforce the privacy protections afforded under state law and advance the purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) while at the same time preserving a mode of informal discovery that may be helpful in streamlining litigation in Georgia. Baker v. Wellstar Health Sys., 288 Ga. 336, 703 S.E.2d 601 (2010).

**Subpoena of personal medical records.**

Health information contained in the defendant's hospital records was subject to disclosure under O.C.G.A. § 24-9-40(a) after the district attorney's office obtained a

search warrant, which was narrowly drafted to seek only the records related to the defendant's treatment on the night of a crime. Bowling v. State, 289 Ga. 881, 717 S.E.2d 190 (2011).

## 24-9-47. (Effective until January 1, 2013) Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information may be disclosed to the person identified by that information or, if that person is a minor or incompetent person, to that person's parent or legal guardian.

(d) AIDS confidential information may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test may be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Public Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Public Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Public Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Public Health.

(3) The Department of Public Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Public Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the department likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any

parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee is authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees are only authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

(q) A public safety agency or district attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-66.1, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such

person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information may be disclosed as medical information pursuant to Code Section 24-9-40, relating to the release of medical information, or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure; or

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil cause of action; or

(C) A public safety agency or the Department of Public Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and for purposes of this subsection the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Public Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally

discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Public Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-9-40.1 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his heirs, successors, assigns, or a beneficiary of such person, including but not limited to an executor, administrator, or personal representative of such person's estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person's care and treatment, the nature and extent of his injuries, the extent of his damages, his medical condition, or the reasons for his death at issue in any civil or criminal proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33, relating to the collection, use, and disclosure of information gathered by insurance institutions.

(aa) In connection with any civil or criminal action in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including but not limited to testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Public Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, mentally retarded, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided

in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information

will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, so long as the identity of the person identified by such information is not thereby revealed. (Code 1981, § 24-9-47, enacted by Ga. L. 1988, p. 1799, § 6; Ga. L. 1989, p. 14, § 24; Ga. L. 1990, p. 705, § 1; Ga. L. 2000, p. 20, § 19; Ga. L. 2004, p. 161, § 5; Ga. L. 2008, p. 12, § 2-4/SB 433; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 5-6/HB 214.)

**The 2011 amendment,** effective July 1, 2011, substituted "Department of Public Health" for "Department of Community Health" throughout this Code section; and deleted "as" following "shall apply" in the second sentence of subsection (aa).

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U. L. Rev. 147 (2011).

## ARTICLE 3

## EXAMINATION

### 24-9-61. (Effective until January 1, 2013) Right to have witnesses sequestered; effect of irregularity.

#### JUDICIAL DECISIONS

Analysis

General Consideration
Right of Sequestration

#### General Consideration

**Rule of sequestration was not violated, etc.**

Because the target of the invocation of the rule of sequestration did not testify, the trial court's failure to enforce the rule against that person was not an abuse of discretion. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

#### Right of Sequestration

**Waiver of right.**

Defendant waived the defendant's argument regarding an alleged violation of the rule of sequestration, O.C.G.A. § 24-9-61, caused by the courtroom sound system being loud enough to be heard in the hallway outside, by failing to object and continuing the defendant's examination of

the witness. Watson v. State, 304 Ga. App. 128, 695 S.E.2d 416 (2010).

**Counsel not ineffective for failing to invoke rule of sequestration.** — Defendant did not show prejudice due to trial counsel's failure to invoke the rule of sequestration because the jury was informed of the earlier presence of the victim's father in the courtroom, defense counsel thoroughly cross-examined the father, and the trial court properly instructed the jurors on their role in resolving conflicts in the evidence and in determining the credibility of witnesses, the weight of the evidence, and whether a witness was impeached; thus, the jury was able to gauge the father's credibility and make a determination as to the weight, if any, it would give to the father's testimony. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Any deficiency by trial counsel in failing to request the trial court to invoke the rule of sequestration was not the cause of any alleged prejudice to the defense because the state had not identified the victim's father as a witness until the parties had presented their opening statements and, thus, the father would not have been required to stay out of the courtroom even if defense counsel had invoked the rule of sequestration at the beginning of trial. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

Trial counsel was not ineffective for failing to invoke the rule of sequestration at the beginning of the trial because the defendant failed to show any harm that resulted from the admission of the testimony of the victim's father; the evidence presented by both the state and the defense showed that the father's testimony about what happened did not conflict with the defendant's claim. Pennington v. State, 313 Ga. App. 764, 723 S.E.2d 13 (2012).

## 24-9-64. (Effective until January 1, 2013) Right of cross-examination.

### JUDICIAL DECISIONS

Analysis



#### Scope of Cross-Examination

#### 2. Discretion of Judge

**Regulation of scope of cross-examination, etc.**

There was no reversible error in a trial court's limitation of the cross-examination of a key state's witness and of a child victim when the defendant failed to show that the substance of the defendant's questions was limited, or how any of the trial court's actions affected the cross-examination or the defendant's ability to impeach the witnesses. Kerdpoka v. State, 314 Ga. App. 400, 724 S.E.2d 419 (2012).

#### 3. Specific Applications

**Expert witnesses.**

Trial court did not err in overruling the defendant's objection to the state's cross-examination of defendant's expert witness, who opined about an alleged failure to properly document the preliminary interview of the victim, on the ground that the defendant previously impeached a deputy by showing the deputy the deputy's report and eliciting testimony that the deputy did ask and the victim did answer more substantive questions because the state's question did not inaccurately characterize the prior testimony, nor refer to facts not in evidence, since there was testimony that the interview consisted of nothing more than asking the victim the victim's name and other preliminary information; that the defendant was able to later educe testimony to the contrary did not make the question improper as stated. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

Juvenile court did not err in prohibiting defense counsel from asking an officer, who was qualified as an expert, how many shoe print comparisons the officer had actually performed because the officer testified on the first day of the hearing that the officer had handled other cases involving shoe-print matching, and the juvenile court already had qualified the officer as an expert witness. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010).

**Testimony from witness with immunity.** — Any error in limiting a defendant's cross-examination of a witness who had been granted immunity from prosecution was harmless given that the state informed the jury that: the witness had received testimonial immunity; at the time the witness gave the witness's statement to police, the witness was charged only with criminal attempt to commit armed robbery; the detective told the witness then that other charges might be added, or the witness may be offered a plea agreement; the witness was jailed after giving a statement; and the witness was later charged with felony murder and possession of a firearm during the commission of a felony. Younger v. State, 288 Ga. 195, 702 S.E.2d 183 (2010).

**Victim's mother.** — Because the defendant did not perfect the record with a sufficient proffer of the testimony of the victim's mother, the court of appeals was unable to reach the merits of the defendant's claim that his cross-examination of the mother would have shown that she had a possible bias or motive for testifying against the defendant and that the mother had made prior allegations that one of her children had been molested; even if review of the alleged error had not been waived, the defendant did not show how the trial court's ruling prevented him from showing any bias or prejudice against him on the part of the mother because the defendant was not prohibited from cross-examining the mother about the state of her feelings toward him pursuant to O.C.G.A. § 24-9-68 and about his relationship with her, and the evidence at trial included the direct testimony of the victim, who testified as to the offenses the defendant committed against her, as well as the chemical evidence of the defendant's semen on the victim's bed sheets. Miceli v. State, 308 Ga. App. 225, 707 S.E.2d 141 (2011).

**Relationship with victim.** — In defendant's trial on a charge of aggravated assault under O.C.G.A. § 16-5-21(a), the trial court did not abuse the court's discretion under O.C.G.A. § 24-9-64 in precluding the defendant from cross-examining the victim about what the victim meant when the victim said that there was tension in the victim's relationship with the defendant and that the victim was going through a transitional period in the victim's life; while the defendant contended that the defendant wanted to examine the victim about the victim's failure to comply with a drug rehabilitation program in which the victim was enrolled and that the defendant was upset about the possibility that the victim would leave Georgia if the victim failed to complete the program, thereby ending the relationship, such evidence was irrelevant to the defendant's justification defense because it was not evidence either of the victim's general reputation for violence or of specific acts of violence perpetrated by the victim. Evidence about the status of the couple's relationship and the nature of their arguments in the week leading up to their fight would not have shed any light on whether the defendant was in reasonable fear of suffering immediate serious harm to the defendant when the defendant choked the victim and threatened to kill the victim. As such, the trial court did not err in ruling that the evidence was irrelevant. Chambers v. State, 308 Ga. App. 748, 708 S.E.2d 651 (2011).

**Specific questions.**

Trial court did not manifestly abuse the court's discretion in liniting the defendant's crossexamination of a police officer by restricting the defendant from asking the officer about criminal charges brought against other persons involved in the underlying incident because the defendant did not show that allowing cross-examination about whether another party was charged with the offense of selling cocaine would have raised a reasonable inference that the defendant was not guilty of the separate offense of possession of cocaine with intent to distrib-

ute. Bush v. State, 305 Ga. App. 617, 699 S.E.2d 899 (2010).

Trial court did not abuse the court's discretion in curtailing the defendant's cross-examination of a Department of Family and Children Services (DFCS) employee about whether the Department at some point thought the evidence was not sufficient to warrant referring a victim's case to the district attorney and whether the victim's mother laughed when the mother was told of the victim's allegations because even if DFCS had initially concluded that a referral was not warranted or that the mother had laughed, such evidence could have no relevance to any issue in the defendant's child molestation case. Kay v. State, 306 Ga. App. 666, 703 S.E.2d 108 (2010).

Trial court did not err in requiring defense counsel to voir dire defendant's wife, who had accused defendant of child molestation, prior to questioning her as to possible motives to fabricate her testimony in order to obtain a special visa for victims of domestic violence under the immigration laws. Defense counsel was permitted to cross-examine the wife in these areas, but not to ask questions regarding how the wife came into the United States. Gonzalez v. State, 310 Ga. App. 348, 714 S.E.2d 13 (2011).

Trial court did not err in sustaining the state's objection to a defendant's request that a police officer come down from the stand and describe the defendant's tattoos because what the defendant sought was not related to a legitimate purpose of cross-examination, but to introduce evidence from the defendant without the burden of subjecting the defendant to cross-examination. Jefferson v. State, 312 Ga. App. 842, 720 S.E.2d 184 (2011).

## 24-9-66. (Effective until January 1, 2013) Market value as opinion evidence; who may testify as to value.

### JUDICIAL DECISIONS

Analysis

Determination of Market Value
Application in Specific Cases

**Determination of Market Value**

**Hearsay evidence.**

Debtor's testimony, standing alone, was insufficient under O.C.G.A. § 24-9-66 to establish the fair and reasonable value of the debtor's car at the time the car was repossessed because the trial court was authorized to conclude that the debtor's "opinion" testimony about the value of the car two years earlier was based entirely upon hearsay and that, absent any evidence to show that the hearsay was reliable, the debtor failed to demonstrate a sufficient foundation for the debtor's conclusions; the debtor had no education or experience in the value of vehicles and the debtor presented no evidence of the price the debtor paid for the car, the condition of the car at the time the car was repossessed, the potential market for such cars, or other relevant factors to be considered in reaching a conclusion about the car's value. Sevostiyanova v. Tempest Recovery Servs., 307 Ga. App. 868, 705 S.E.2d 878 (2011).

**Owner of property is considered to be qualified to state owner's opinion as to value.**

Trial court did not err in ordering the defendant to pay the victim restitution after the defendant pled guilty to arson in the first degree because the trial court was authorized to find that the preponderance of the evidence showed that the victim owned the house at the time of the fire, and evidence was presented to show the cost of repairs and its relation to the value of the house prior to the fire, in accordance with the law of damages to real property; the evidence of the background of the victim, a real estate investor who repaired houses personally, provided some evidence to show that the investor had knowledge, experience, or familiarity with the cost of repairs, the value of real estate,

and the extent of the damages to the investor's property pursuant to O.C.G.A. § 24-9-66. Mayfield v. State, 307 Ga. App. 630, 705 S.E.2d 717 (2011).

### Application in Specific Cases

**Bridge.** — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's opinion testimony concerning the cost to build a bridge over a waterway to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to O.C.G.A. § 24-9-66 a basis upon which the witness could have formed the witnesses own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness received. Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

**Value of dog.** — Trial court did not err in assessing the value of a dog the defendant killed at $3,000 because evidence of the knowledge, experience, and familiarity of a witness with the value of labrador retrievers trained to hunt created a basis for the value stated. Futch v. State, 314 Ga. App. 294, 723 S.E.2d 714 (2012).

## 24-9-67. (Effective until January 1, 2013) Opinions of experts admissible in criminal cases.

### JUDICIAL DECISIONS

Analysis



### General Consideration

**Applicable only in criminal cases.** — Trial court was not required to consider a driver's expert affidavits under O.C.G.A. § 24-9-67 in a products liability action because by the statute's terms, the statute applied to criminal cases, not civil cases. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

**Limiting questioning of expert.** — Trial court did not err in limiting appellate counsel's questioning of an expert witness at the hearing on the defendant's motion for new trial because there was sufficient evidence before the trial court to show what the expert's testimony would have been had defense counsel called the expert as a witness; appellate counsel called the witness and questioned the witness about the techniques used to question young children and the reliability of a young child's testimony, and the trial court decided to limit the testimony only when appellate counsel began asking specific questions about one of the interviews. Vaughn v. State, 307 Ga. App. 754, 706 S.E.2d 137 (2011).

### Qualification as Expert

**Qualification as expert satisfied.** Evidence was sufficient for a rational trier of fact to find the defendant guilty of aggravated sodomy of one victim and rape and aggravated sodomy of a second victim because the jury was authorized to conclude, based on a nurse's testimony and the medical evidence, that penetration occurred; the nurse was properly tendered and accepted as an expert in the subject of sexual assault examinations, and the nurse testified that the first victim's external injuries established the potential for penetration. Blash v. State, 304 Ga. App. 542, 697 S.E.2d 265 (2010).

Juvenile court did not abuse the court's discretion in determining that an officer

possessed the requisite skill and experience to testify as an expert because the officer was experienced, had investigated thousands of crimes, was trained in crime scene observation, and had handled other cases involving shoe-print matching. In the Interest of J.D., 305 Ga. App. 519, 699 S.E.2d 827 (2010).

Trial court did not abuse the court's discretion in qualifying a witness as an expert in the valuation of transportation equipment because the witness testified that the witness had been in the repossession business 22 years, with another 6 or 8 years dealing specifically with equipment repossession, that the witness was qualified to estimate the value and condition of transportation equipment, and that the witness had been qualified as an expert 15-20 times in other court proceedings. Rushing v. State, 305 Ga. App. 629, 700 S.E.2d 620 (2010).

### Illustrations

#### 1. Opinions Admissible

**Testimony from medical examiner on findings.** — State was properly allowed to ask a medical examiner (ME) whether the defendant's account of the homicide was consistent with the ME's findings in the autopsy as: 1) the ME did not state an opinion as to the veracity of any witness or the defendant; and 2) the ME's testimony did not go to the ultimate issue because the defendant admitted strangling the victim but claimed self-defense. Cade v. State, 289 Ga. 805, 716 S.E.2d 196 (2011).

**Expert testimony on pancreatic injury.** — Trial court did not abuse the court's discretion in allowing the state's expert witness to testify to the cause of certain of the victim's injuries because the expert testified that one of the victim's injuries was caused by blunt force trauma without opining on how such trauma occurred; the opinion offered by the expert regarding the cause of the victim's pancreatic injury was one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion was beyond the ken of the average layman. Amador v. State, 310 Ga. App. 280, 713 S.E.2d 423 (2011).

**Pediatrician's opinion that a child had been molested, etc.**

Defendant had no ground to contest the trial court's decision to allow a pediatrician to give opinion testimony to show that the victims' recitation of events was consistent with child abuse because the state proffered the pediatrician as an expert in the field of child sexual abuse, and with no objection from the defense, the trial court so qualified the pediatrician. Ledford v. State, 313 Ga. App. 389, 721 S.E.2d 585 (2011).

**Testimony by polygraph examiner.** — Trial court did not err by allowing a polygraph examiner to testify that the defendant showed deception to questions concerning an armed robbery because the defendant, by stipulation, voluntarily consented to admission of the polygraph test results. Therefore, the defendant agreed to the admission of the examiner's opinion testimony concerning the polygraph examination, and the trial court did not err by overruling the defendant's objection to the qualifications of the examiner, or by allowing the examiner to testify as an expert concerning the polygraph test which the examiner administered on the defendant. Jones v. State, 309 Ga. App. 886, 714 S.E.2d 590 (2011).

**Expert testimony on interviewing techniques in child abuse case not improperly restricted.** — Trial court did not improperly restrict the testimony of the defendant's expert because the expert was permitted to testify at length on the propriety and effect of interviewing techniques in child sexual abuse cases; the defendant did not point out how the trial court's decision to sustain the state's objection to the expert's statement unfairly restricted the expert's testimony when the expert went on to provide the expert's criticisms of how the victim's interview was conducted. Rayner v. State, 307 Ga. App. 861, 706 S.E.2d 205 (2011).

#### 2. Opinions Inadmissible

**Opinion going to matter of ultimate fact.**

Trial court did not err in refusing to permit a mother's expert to opine that a son's murder was foreseeable because it was within the discretion of the trial court

to determine that no expert testimony on the question of foreseeability was required; the jury in this case, having heard evidence of numerous prior criminal acts that occurred in or around the complex, was capable of deciding the question of foreseeability without expert testimony on the ultimate issue. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, 2012 Ga. LEXIS 270 (Ga. 2012).

**Expert testimony on transference theory.** — Trial court's refusal to admit eyewitness expert testimony was supported by extensive corroborating evidence because there was no factual basis for allowing testimony regarding the potential for misidentification based on transference theory; the defendant presented no evidence indicating that the victim saw or could have seen any other person at the time the instant offenses took place. Cannon v. State, 310 Ga. App. 262, 712 S.E.2d 645 (2011).

**Medical examiner's opinion on defendant's demeanor admissible.** — Trial court did not err in allowing the testimony of the deputy medical examiner in which the examiner related observations of the defendant during an interview of the defendant because the examiner stated the general observation of the defendant's demeanor upon being told that the defendant's child had died. Smith v. State, 290 Ga. 428, 721 S.E.2d 892 (2012).

### RESEARCH REFERENCES

**ALR.** — Admissibility of computer forensic testimony, 40 ALR6th 355.

Qualification as expert to testify as to findings or results of scientific test concerning DNA matching, 38 ALR6th 439.

Admissibility of evidence taken from vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "black boxes", 40 ALR6th 595.

## 24-9-67.1. (Effective until January 1, 2013) Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.

**Law reviews.** — For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010). For annual survey of law on product liability, see 62 Mercer L. Rev. 243 (2010). For annual survey of law on trial practice and procedure, see 62 Mercer L. Rev. 339 (2010).

### JUDICIAL DECISIONS

**Application of Daubert standard.** — After a trial court found that an expert's testimony failed the first element of Daubert because the expert's theory was essentially untestable and had not been tested, the trial court properly exercised the court's discretion in weighing the fourth Daubert factor—whether the theory had attained general acceptance within the scientific community—less heavily than the other three Daubert factors. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

As the trial court's finding that the plaintiff's expert was a "quintessential expert for hire" was supported by the evidence, it was within the trial court's discretion to apply the Daubert factors with greater rigor in determining the admissibility of the expert's opinion. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

**Trial court's denial of Daubert motion presumed correct.** — Trial court's evidentiary ruling, denying a property owner's Daubert motion to exclude a bank's appraiser's expert testimony pursuant to O.C.G.A. § 24-9-67.1(b), was presumed correct since no transcript from the hearing thereon appeared in the record.

Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012).

**No error in excluding expert testimony.**

Expert's testimony was properly excluded in a medical malpractice suit for corrective bladder surgery for perforations following a hysterectomy because the expert was board certified in geriatrics, and the expert had not been engaged in the active practice of gynecology or urology for three of the five years before the patient's operation. Hope v. Kranc, 304 Ga. App. 367, 696 S.E.2d 128 (2010).

Trial court did not err in excluding the testimony of a nurse under O.C.G.A. § 24-9-67.1 because the nurse had not been practicing in the relevant area of nursing for three of the five years preceding a patient's accidental fall. At best, the nurse had worked full-time as a nurse for only 11 months, although the nurse had also cared for the nurse's husband and mother. Vaughan v. WellStar Health Sys., 304 Ga. App. 596, 696 S.E.2d 506 (2010).

As vehicle occupants failed to satisfy the Daubert factors or any other reasonable criteria for purposes of measuring the reliability of their expert witness's conclusions with respect to a vehicle accident that occurred in a construction zone, a trial court did not abuse the court's discretion when the court excluded the witness's testimony under O.C.G.A. § 24-9-67.1; the expert's conclusions were based solely on the expert's own assertions and were unsupported by either the Daubert factors or any other reasonable reliability criteria. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770 (2010).

It was within the trial court's discretion to exclude an expert witness's testimony because a sister and a brother failed to satisfy the Daubert factors or any other reasonable criteria by which the trial court could measure the reliability of the expert's conclusions; the expert failed to cite any treatise or authority supporting the expert's opinion, and the sister and brother presented no evidence that the expert had any experience that would supply the foundation supporting the expert's conclusions. HNTB Ga., Inc. v. Hamilton-King, 287 Ga. 641, 697 S.E.2d 770 (2010).

In a mother's medical malpractice action against a hospital, the trial court did not abuse the court's discretion by finding that the mother's witness was not admissible as an expert on whether any member of the hospital's nursing staff breached the standard of care pursuant to O.C.G.A. § 24-9-67.1(c)(2)(D) because the witness deposed that the witness did not train or practice as a nurse, did not train nurses, did not supervise nurses outside of normal nurse-physician interactions, and did not hold out to be an expert in nursing or in the standard of care of nurses. Pendley v. S. Reg'l Health Sys., 307 Ga. App. 82, 704 S.E.2d 198 (2010).

Trial court did not abuse the court's discretion in granting a motion in limine in a legal malpractice action to exclude a purported expert witness on the standard of care, under O.C.G.A. § 24-9-67.1, because the witness, although a member of the state bar, worked as a merchant for a family owned business and was not then engaged in any activities that constituted practicing law in Georgia under O.C.G.A. § 15-19-50. Further, the trial court's misguided analogy to a medical malpractice expert under § 24-9-67.1(c)(2)(D) did not result in reversible error. Wilson v. McNeely, 307 Ga. App. 876, 705 S.E.2d 874 (2011).

Opinion of the plaintiff's expert, a pathologist, failed the first element of Daubert because the expert relied on the theory that any exposure to the asbestos in the defendant's product would contribute to the development of mesothelioma, yet the expert testified that the theory was essentially untestable and had not been tested. Thus, the expert's testimony was properly excluded under O.C.G.A. § 24-9-67.1(b)(2) since it was not the product of reliable principles and methods. Butler v. Union Carbide Corp., 310 Ga. App. 21, 712 S.E.2d 537 (2011).

Trial court did not abuse the court's discretion in refusing to permit a mother's expert on security practices to testify about the content of certain service call lists on which the expert had relied in forming the expert's opinions about the adequacy of security at the complex because the mother made no showing that the circumstances of the various incidents

reflected on the lists were substantially similar to the murder of her son, such that those incidents would bear directly upon the question of foreseeability; the lists were confusing, and substantial explanation would have been required for the jury to understand the lists. Raines v. Maughan, 312 Ga. App. 303, 718 S.E.2d 135 (2011), cert. denied, 2012 Ga. LEXIS 270 (Ga. 2012).

Trial court did not err in determining that the affidavits of a driver's experts were inadequate under O.C.G.A. § 24-9-67.1(b) to defeat summary judgment in favor of a manufacturer in the driver's products liability action because the affidavits did not describe the facts or data upon which the experts' opinions were based, did not explain the principles or methods the experts used to reach the experts' conclusions about the tire, and did not provide support for a conclusion that the experts had applied those principles and methods reliably in the experts' inspections of the tire. Udoinyion v. Michelin N. Am., Inc., 313 Ga. App. 248, 721 S.E.2d 190 (2011).

**Qualification as an expert not satisfied.** — Trial court did not err in refusing to qualify the employees' witness as an expert because the witness's testimony provided no evidence, let alone expert testimony, that would preclude summary judgment in favor of the Georgia Department of Human Services, and under O.C.G.A. § 24-9-67.1(d), the trial court had discretion in determining whether expert testimony was necessary; any use of the witness as an expert in the case was wholly unnecessary because the areas of the expert's specialized knowledge were not issues beyond the ken of lay persons Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 708 S.E.2d 660 (2011).

**Qualification of nurses as expert witnesses.**

In a case involving a patient who fell at the doctor's office while a nurse was weighing the patient, a trial court abused the court's discretion in concluding that a nursing expert was not qualified to testify under O.C.G.A. § 24-9-67.1. The proper area of specialty was not weighing patients, in which the nurse expert had little experience, but managing patient safety while moving or directing patients, in which the nurse expert had sufficient experience at a surgical clinic. Anderson v. Mt. Mgmt. Servs., 306 Ga. App. 412, 702 S.E.2d 462 (2010).

**Expert allowed to testify.**

There was no abuse of discretion in allowing a witness to testify as an expert on steel and polymer vaults or soil conditions in an action seeking a permanent injunction against a cemetery group because the cemetery group failed to show that the testimony was not the product of reliable principles and methods. Savannah Cemetery Group, Inc. v. DePue-Wilbert Vault Co., 307 Ga. App. 206, 704 S.E.2d 858 (2010).

In a visitation dispute, it was not an abuse of discretion to allow the subject children's therapist to testify as an expert in child psychology because any dispute as to the witness's qualifications was properly explored on cross-examination and went to the weight of the witness's testimony, rather than the admissibility of that testimony. Gottschalk v. Gottschalk, 311 Ga. App. 304, 715 S.E.2d 715 (2011).

Trial court's evidentiary ruling, denying a property owner's Daubert motion for a hearing to determine the competence of a bank's appraiser pursuant to O.C.G.A. § 24-9-67.1(b), was not an abuse of discretion because disputes as to the expert's credientials went to the weight and credibility of the testimony, but not to the admissibility. Vill. at Lake Lanier, LLC v. State Bank & Trust Co., 314 Ga. App. 498, 724 S.E.2d 806 (2012).

**Trial court should rule on admissibility before ruling on summary judgment.** — Because the opinions of a homeowner's experts, if admissible, would present a jury question cn the issue of an exterminator's breach of contract and the extent of the homeowner's damages, a trial court erred in failing to decide the admissibility of these opinions under O.C.G.A. § 24-9-67.1 before granting summary judgment to the exterminator. An v. Active Pest Control South, Inc., 313 Ga. App. 110, 720 S.E.2d 222 (2011).

Summary judgment entered in favor of a sanitation company was vacated as to a citizen's claim that the company negligently damaged a platform, created a trip-

ping hazard, and caused the citizen's injuries because the trial court had to rule on the admissibility of the citizen's expert witness before the court of appeals could consider whether the company bent the landing and caused a tripping hazard; the company moved to exclude the expert's testimony under O.C.G.A. § 24-9-67.1, but the trial court never ruled on admissibility. Burroughs v. Mitchell County, 313 Ga. App. 8, 720 S.E.2d 335 (2011).

### RESEARCH REFERENCES

**ALR.** — Qualification as expert to testify as to findings or results of scientific test concerning DNA matching, 38 ALR6th 439.

Admissibility of computer forensic testimony, 40 ALR6th 355.

Admissibility of evidence taken from vehicular Event Data Recorders (EDR), Sensing Diagnostic Modules (SDM), or "black boxes", 40 ALR6th 595.

Admissibility of biomedical engineer testimony, 43 ALR6th 327.

Necessity and admissibility of expert testimony to establish malpractice or breach of professional standard of care by architect, 47 ALR6th 303.

## 24-9-68. (Effective until January 1, 2013) Witness's feelings and relationship to parties provable.

### JUDICIAL DECISIONS

Analysis

General Consideration
Relationships

#### General Consideration

**Officer making threat against defendant.** — Although the trial court erred in excluding evidence that a supervising officer subsequently made a threat against the defendant because the evidence was admissible under O.C.G.A. § 24-9-68, the trial court's exclusion of the evidence provided no ground for reversal since the supervising officer's testimony was corroborated by the testimony of two other witnesses, and the excluded evidence did not challenge the credibility of the other two witnesses; thus, the evidence that the defendant committed obstruction as charged in the accusation was overwhelming, and it was highly probable that the trial court's error did not contribute to the verdict. Edwards v. State, 308 Ga. App. 569, 707 S.E.2d 917 (2011).

**Issue not preserved for appellate review.** — Because the defendant never argued in the trial court that the testimony the prosecuting attorney elicited by the cross-examination of a defense witness was not probative of any relationship between the defendant and the witness under O.C.G.A. § 24-9-68, there was nothing for the court of appeals to review on appeal; at trial, defense counsel never argued that the questions the prosecuting attorney proposed to ask, and ultimately did ask, of the witness would not elicit testimony showing some relationship between the two and that the proposed cross-examination, therefore, was not probative of a relationship under O.C.G.A. § 24-9-68, and although defense counsel objected that the pending charge was not a conviction, that was a different objection than the one the defendant raised on appeal. Luckie v. State, 310 Ga. App. 859, 714 S.E.2d 358 (2011), cert. denied, No. S11C1803, 2011 Ga. LEXIS 965 (Ga. 2011).

#### Relationships

**Homosexuality.** — State was entitled to establish the homosexual relationship between the defendant and the state's key witness pursuant to O.C.G.A. § 24-9-68, and the state did not attempt to belabor the issue beyond this limited purpose.

Moreover, trial counsel sought through voir dire to eliminate jurors who may have held biases against those practicing homosexuality. State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011).

**Cross examination of mother of child abuse victim.** — Because the defendant did not perfect the record with a sufficient proffer of the testimony of the victim's mother, the court of appeals was unable to reach the merits of the defendant's claim that his cross-examination of the mother would have shown that she had a possible bias or motive for testifying against the defendant and that the mother had made prior allegations that one of her children had been molested; even if review of the alleged error had not been waived, the defendant did not show how the trial court's ruling prevented him from showing any bias or prejudice against him on the part of the mother because the defendant was not prohibited from cross-examining the mother about the state of her feelings toward him pursuant to O.C.G.A. § 24-9-68 and about his relationship with her, and the evidence at trial included the direct testimony of the victim, who testified as to the offenses the defendant committed against her, as well as the chemical evidence of the defendant's semen on the victim's bed sheets. Miceli v. State, 308 Ga. App. 225, 707 S.E.2d 141 (2011).

## 24-9-69. (Effective until January 1, 2013) Testifying after recollection refreshed; swearing from written memorandum.

### JUDICIAL DECISIONS

ANALYSIS

ILLUSTRATIONS

#### Illustrations

**Refreshing police officer's recollection on be on the lookout bulletin.** — Trial court's refusal in a suppression hearing to allow a police officer to refresh the officer's recollection about the contents of a be on the lookout police dispatch was harmless error because, given the other evidence that was presented, it did not contribute either to the court's decision on the suppression motion or to the court's adjudication of a juvenile as delinquent. In re H.A., 308 Ga. App. 111, 706 S.E.2d 615 (2011).

# ARTICLE 4

# CREDIBILITY

## 24-9-80. (Effective until January 1, 2013) Credibility a jury question.

### JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CIVIL CASES
CRIMINAL CASES

### General Consideration

**Despite improper bolstering, no prejudice to defendant.** — Trial court erred in admitting a child molestation victim's prior consistent statements made to her mother and to an expert on child abuse because the statements did not predate her alleged motive to fabricate her claims against her step-father so that he would be removed from her home; however, the defendant failed to show prejudice from the statements. Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

### Civil Cases

**Verdict precluded by jury's insufficient opportunity to determine credibility of witness testimony.** — Verdict against an accountant was precluded by judicial admissions by an investor's cousin that the cousin alone took the investor's money because there were no admissions in pleadings or in response to requests for admissions from the cousin, only the cousin's testimony at trial; pursuant to O.C.G.A. § 24-9-80, any witness's testimony is subject to a determination of credibility by the jury. McIntee v. Deramus, 313 Ga. App. 653, 722 S.E.2d 377 (2012).

### Criminal Cases

**Witnesses' credibility is for jury.** Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010).

**Impeachment of witness by conviction.** — Trial court did not abuse the court's discretion in denying the defendant's motion for mistrial even though the state's question to the defendant's parent was an improper attempt to impeach or destroy the credibility of the parent by showing that the parent was incarcerated in jail because the parent was not crucial to the defense as the parent was not an eyewitness to the crime and could not bolster any self-defense claim since the parent was not present when the crime occurred; the trial court instructed the jurors to disregard the question and struck the question from the consideration of the jury. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010).

## 24-9-82. (Effective until January 1, 2013) How witness impeached — Disproving testimony.

### JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

### General Consideration

**Evidence of prior crimes or bad acts, etc.**

While a criminal defendant was not subject to impeachment by proof of general bad character or prior convictions, when defense counsel opened the door to asking about the defendant's being in trouble before, the prosecutor could then impeach the defendant with other convictions that the defendant neglected to mention. Scruggs v. State, 309 Ga. App. 569, 711 S.E.2d 86 (2011).

**Character evidence.**

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's

testimony after the defendant intentionally elicited the testimony as to defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when it held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

**Admissibility of evidence initially excluded.**

Although a trial court granted an employee's motion in limine to exclude evidence that the employee had been taken out of service several hours prior to a workplace accident, once the employee submitted to questioning on the issue without seeking to enforce the limine ruling, the employee opened the door to being impeached by the employee's supervisors' depositions that the employee had been taken out of service due to a safety violation. Smith v. CSX Transp., Inc., 306 Ga. App. 897, 703 S.E.2d 671 (2010), aff'd 289 Ga. 903, 717 S.E.2d 209 (2011).

**Evidence found admissible.**

Trial court did not err in overruling the defendant's objection to an officer's testimony that the officer and another officer recovered a 9mm handgun from the defendant when the officers arrested the defendant because there was no basis for concluding that either officer committed perjury, but rather, it appeared that the memory of one of the officers could have faded as to that detail during the two years that elapsed between the defendant's arrest and trial; although the discrepancy could have given the defendant the opportunity to impeach the credibility of the officer who testified at trial by disproving a fact to which the officer testified, the fact that the officer's recollection of the events differed from the other officer's pretrial testimony did not render the testimony about the gun inadmissible, but rather, the matter was one of credibility for the jury to resolve. Willis v. State, 309 Ga. App. 414, 710 S.E.2d 616 (2011), cert. denied, No. S11C1356, 2012 Ga. LEXIS 70 (Ga. 2012).

Trial court did not err in allowing the prosecutor to read defendant's entire criminal history into evidence because the basis for admitting the evidence pursuant to O.C.G.A. § 24-9-82 was to disprove defendant's lie by omission in response to a question at trial involving the defendant's previous encounters with law enforcement. McNeal v. State, 289 Ga. 711, 715 S.E.2d 95 (2011).

Trial court did not abuse the court's discretion in allowing a railroad to cross-examine an employee and in admitting the testimony of supervisors for purposes of disproving certain facts to which the railroad had testified because the circumstances surrounding the employee's dispute with the supervisors was at least indirectly material to the matters at issue in the case; the employee opened the door to being impeached with evidence that tended to disprove the employee's testimony. CSX Transp., Inc. v. Smith, 289 Ga. 903, 717 S.E.2d 209 (2011).

## 24-9-83. (Effective until January 1, 2013) How witness impeached — Previous contradictory statements; foundation; proof of good character to sustain witness.

### JUDICIAL DECISIONS

#### Analysis

### Admissibility of Statement

#### 1. In General

**Admission by witness of previous statement.**

Trial court did not err in allowing the prosecutor to play the entire tape of an out-of-court police interview of a witness for the state because the fact that the witness admitted that the witness made the inconsistent pre-trial statement did not render the statement inadmissible. Johnson v. State, 289 Ga. 106, 709 S.E.2d 768 (2011).

#### 2. What Statements Admissible

**Prior inconsistent statement.**

In a negligence action against a dump truck driver and the driver's employer, given the driver's trial testimony regarding the driver's driving experience, the trial court did not abuse the court's discretion in admitting testimony regarding statements in the driver's purported employment application regarding the driver's truck driving experience as prior inconsistent statements. A & G Trucking, Inc. v. Pitts, 306 Ga. App. 718, 703 S.E.2d 134 (2010).

Defendant was not entitled to a directed verdict of acquittal on a voluntary manslaughter count predicated on the defendant's claim of defense of habitation, O.C.G.A. § 16-3-23, because the evidence was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of voluntary manslaughter in violation of O.C.G.A. § 16-5-2(a) and to find that the defendant's stabbing of the victim was not justified in defense of the defendant's habitation; the jury was authorized to rely upon the defendant's prior inconsistent statement to the defendant's relative to conclude that the victim's entry into the defendant's apartment was not "violent and tumultuous." Muckle v. State, 307 Ga. App. 634, 705 S.E.2d 721 (2011).

### Foundation

**Impeachment inappropriate when inadequate foundation laid.** — Trial court's decision to foreclose the defendant from impeaching two of the state's witnesses during defendant's crossexamination of the responding police officer with the witnesses prior recorded statements was appropriate because the door to impeachment was never opened since the witnesses never denied making a contradictory statement; even assuming the witnesses denied making a contradictory statement, the defense never laid a proper foundation for the use of any such statement for impeachment purposes. Mubarak v. State, 305 Ga. App. 419, 699 S.E.2d 788 (2010).

**Requirements as to laying of foundation fulfilled.**

Witnesses' viewing of recordings of their earlier statements satisfies the requirement that the time, place, person, and circumstances attending the former statements shall be called to the witness's mind with as much certainty as possible pursuant to O.C.G.A. § 24-9-83. Williams v. State, 304 Ga. App. 592, 696 S.E.2d 512 (2010).

Proper foundation for a child molestation victim's prior inconsistent statement to police and authorities was laid under O.C.G.A. § 24-9-83 by the victim acknowledging making the prior statements, conceding that the statements were contradictory to the victim's trial testimony, and explaining that the allegations was fabricated to anger the defendant's spouse. Gunter v. State, 313 Ga. App. 756, 722 S.E.2d 450 (2012).

**Failure to lay proper foundation to impeach witnesses not ineffective assistance of counsel because different outcome would not result.**

Trial counsel did not provide ineffective assistance by failing to object to the arresting detective's testimony about what a witness told the defendant just prior to a shooting because although the testimony was inadmissible hearsay since the state failed to lay a proper foundation for the admission of a prior inconsistent statement by not asking the witness about the witness's statement, the defendant failed to show a reasonable probability that the outcome of the trial would have been different if counsel had objected to the testimony; four eyewitnesses other than the witness testified that those witnesses saw the defendant shoot the victim, and the witnesses independently picked the defen-

dant out of a photographic lineup. Cannon v. State, 288 Ga. 225, 702 S.E.2d 845 (2010).

**Time.**

State had not been obliged to let a witness listen to the witness's taped prior inconsistent statement before playing back the recording to impeach the witness. As the prosecutor questioned the witness in detail about the time, place, person, and circumstances attending the former statement, including the inconsistency at issue, this line of questioning established an ample foundation for introduction of the statement. Cade v. State, 289 Ga. 805, 716 S.E.2d 196 (2011).

## 24-9-84. (Effective until January 1, 2013) How witness impeached — Reputation as bad character; limitations; procedure; how witness sustained; when particular transactions or individual opinions may be inquired of.

### JUDICIAL DECISIONS

ANALYSIS

PROOF OF GOOD CHARACTER

**Proof of Good Character**

**Cross-examination of defendant's character witness, etc.**

Trial court did not err by allowing the state to cross-examine the defendant's biological daughter about having previously worked as a stripper and having abused drugs because the evidence was offered by the state in rebuttal to the daughter's testimony after the defendant intentionally elicited the testimony as to the defendant's and the daughter's own good character; since the only conceivable purpose of the questions defense counsel asked the daughter was to elicit testimony concerning the character of the defendant and the daughter, the trial court did not err when it held that the state could introduce rebuttal evidence on the same subject. Arnold v. State, 305 Ga. App. 45, 699 S.E.2d 77 (2010).

**Pastor testifying to truthfulness of parties.** — Trial court erred by admitting the testimony of a pastor regarding the reputation for truthfulness of a husband and a wife and that the pastor would believe the husband and the wife under oath because the character for truthfulness of the husband and wife had not been attacked since the pastor testified during the case-in-chief of the husband and wife, before any defense witnesses had testified; the error was not harmless because the jury's verdict was based in large part upon the jury's determinations regarding the parties' credibility. Barnett v. Farmer, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

## 24-9-84.1. (Effective until January 1, 2013) How witness impeached — Prior convictions.

### JUDICIAL DECISIONS

**Constitutionality.**

Defendant's constitutional attack on O.C.G.A. § 24-9-84.1(a)(2), which allowed impeachment of the defendant with defendant's prior convictions if defendant chose to testify, was meritless. The constitutional right to testify did not carry with it a right to prohibit impeachment by prior convictions. Childs v. State, 287 Ga. 488, 696 S.E.2d 670 (2010).

**Construction of paragraph (a)(2).** — O.C.G.A. § 24-9-84.1(a)(2), by the statute's own terms, applies to the admissibility of prior convictions for the purpose of impeaching a testifying defendant, and the statute does not apply when the prior

conviction is admitted as a similar transaction for non-impeachment purposes because the analyses for each purpose are treated differently in case law; for example, when a conviction is admitted for impeachment, it is impermissible to use the prior conviction to show a criminal propensity or as substantive evidence of the offense at issue, and likewise, similar transactions are admissible not for impeachment but for the purpose of showing identity, motive, plan, scheme, bent of mind, and course of conduct. Robertson v. State, 306 Ga. App. 721, 703 S.E.2d 343 (2010).

**Construction of paragraph (b).** — Supreme Court of Georgia adopts the date the witness testifies or the evidence of the prior conviction is introduced as the end point for determining whether a conviction falls within the ten-year limit prescribed by O.C.G.A. § 24-9-84.1(b). Clay v. State, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

**Balancing required under paragraph (b).** — Supreme Court of Georgia adopts the application of the following five factors in conducting the balancing required under O.C.G.A. § 24-9-84.1(b): (1) the nature, i.e., impeachment value of the crime; (2) the time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime, so that admitting the prior conviction does not create an unacceptable risk that the jury will consider it as evidence that the defendant committed the crime for which the defendant is on trial; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. While this list is not exhaustive and a trial court has the discretion to consider other factors as the court may deem appropriate in a particular case, these five factors outline the basic concerns relevant to the required balancing. Clay v. State, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

**On-the-record finding required under paragraph (b).** — Trial court must make an on-the-record finding of the specific facts and circumstances upon which the court relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs the prejudicial effect before admitting evidence of the conviction for impeachment purposes under O.C.G.A. § 24-9-84.1(b). To the extent Treadwell v. State, 285 Ga. 736 (2009) and Wilkes v. State, 293 Ga. App. 724 (2008) can be interpreted to hold otherwise, they are overruled. Clay v. State, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

**Indictment is not a conviction.** — Trial court did not err by only allowing into evidence the certified convictions of the state's witness and by not allowing the indictments associated with those convictions to be admitted into evidence as well because the indictments should not have been admitted into evidence along with the witness's convictions; an indictment represents only accusations against a defendant, and is not in itself a conviction. Carter v. State, 289 Ga. 51, 709 S.E.2d 223 (2011).

**Trial court must establish that it balanced use of defendant's prior conviction against risk of prejudice.**

Trial court failed to enter express findings on the record as to whether the probative value of a defendant's 1981 bail-jumping conviction substantially outweighed the conviction's prejudicial effect. If on remand, the trial court determined that the prior conviction was inadmissible after engaging in the balancing test required under O.C.G.A. § 24-9-84.1(b), then a new trial was required. But, if the trial court determined that the prior conviction was admissible, a new trial was not mandated, subject to appellate review for an abuse of discretion. Robinson v. State, 312 Ga. App. 736, 719 S.E.2d 601 (2011).

**Prior conviction properly admitted to impeach defendant's credibility.**

Defendant failed to show that the trial court abused the court's discretion in admitting the defendant's prior conviction for burglary, O.C.G.A. § 16-7-1(a), as impeachment evidence under O.C.G.A. § 24-9-84.1 because the defendant's credibility as to intent was highly relevant to the jury's decision; observing that both the charged offense and the burglary offense for which the defendant was previously

convicted involved an intent to commit a theft, the trial court found that the defendant's burglary conviction had sufficient probative value for the purpose of impeachment on whether the defendant intended to commit the charged theft and that the probative value of the burglary conviction substantially outweighed the conviction's prejudicial effect. Hopkins v. State, 309 Ga. App. 298, 709 S.E.2d 873 (2011).

Defendant's prior convictions for felony forgery, O.C.G.A. § 16-9-1(a), misdemeanor theft by deception, O.C.G.A. § 16-8-3(a), and misdemeanor giving a false name to a law enforcement officer, O.C.G.A. § 16-10-25, were all less than 10 years old and involved dishonesty or false statements. Therefore, those convictions were admissible in the defendant's child molestation trial under O.C.G.A. § 24-9-84.1(b). Damerow v. State, 310 Ga. App. 530, 714 S.E.2d 82 (2011).

In a forgery prosecution, the trial court properly admitted for impeachment purposes the defendant's prior conviction for felony cocaine possession as the court correctly applied the standard set forth in O.C.G.A. § 24-9-84.1(a)(2) and expressly found that the probative value of the prior conviction substantially outweighed the prejudicial effect. Chandler v. State, 311 Ga. App. 86, 714 S.E.2d 597 (2011), cert. denied, No. S11C1861, 2011 Ga. LEXIS 985 (Ga. 2011).

Trial court did not err in admitting the defendant's prior felony convictions to impeach the defendant pursuant to O.C.G.A. § 24-9-84.1(a)(2) because the trial court conducted the proper balancing test when the court admitted the prior felony convictions, and the trial court did not abuse the court's discretion in determining that the probative value of evidence of the prior convictions substantially outweighed their prejudicial effect; O.C.G.A. § 24-9-84.1(a)(2), which applies to prior felony convictions, does not require that the crimes involve dishonesty or making a false statement. Hogues v. State, 313 Ga. App. 717, 722 S.E.2d 430 (2012).

**Prior conviction improperly admitted.** — No independent ground pursuant to the impeachment rules of O.C.G.A. § 24-9-84.1(a)(2) authorized the introduction of evidence that defendant was previously convicted of aggravated assault since defendant did not testify. Furthermore, the statements regarding defendant's criminal record were inherently prejudicial, and, as a result of the admission of those statements, defendant's convictions had to be reversed. Pelowski v. State, 306 Ga. App. 41, 701 S.E.2d 529 (2010).

**Prior conviction properly admitted.** — Defendant impeached a plumbing contractor's testimony to the fullest extent allowed by O.C.G.A. § 24-9-84.1 by introducing and reading into the record a certified copy of the felony conviction of the witness. LN West Paces Ferry Assocs., LLC v. McDonald, 306 Ga. App. 641, 703 S.E.2d 85 (2010).

Trial court did not abuse the court's discretion in allowing the state to introduce evidence of the defendant's prior aggravated assault conviction under O.C.G.A. § 24-9-84.1 because the trial court specifically addressed the relevant factors including the kind of felony involved, the date of the conviction, and the importance of the witness's credibility and properly considered the specific facts and circumstances of the defendant's prior aggravated assault conviction, as required by § 24-9-84.1(b), before concluding that the probative value of evidence of the conviction substantially outweighed the evidence's prejudicial effect; the statute itself contains no distinction between defendants and witnesses when more than ten years has passed since the applicable conviction or release. Dozier v. State, 311 Ga. App. 713, 716 S.E.2d 802 (2011), overruled on other grounds, Clay v. State, 2012 Ga. LEXIS 301 (Ga. 2012).

**Balancing test does not require trial court to list specific factors considered in weighing probative value of prior conviction against risk of prejudice.** — While under O.C.G.A. § 24-9-84.1(a)(2), a trial court must make an on-the-record finding that the probative value of admitting a prior conviction substantially outweighs its prejudicial effect, there is no requirement in the language of § 24-9-84.1(a)(2) that the trial court must list the specific factors the court considered in ruling on the probity

of convictions that are not more than ten years old. To the extent that Abercrombie v. State, 297 Ga. App. 522 (2009), and Dozier v. State, 311 Ga. App. 713 (2011), hold otherwise, they are overruled. Clay v. State, 725 S.E.2d 260, No. S11A1956, 2012 Ga. LEXIS 301 (2012).

**Prior conviction of witness properly excluded.** — In convictions of child molestation, aggravated child molestation, and aggravated sexual battery, a trial court properly excluded for impeachment purposes prior convictions of a motel clerk, who testified that the clerk recalled renting a room to defendant and the victim, since the prior convictions were more than 10 years old. Woods v. State, 304 Ga. App. 403, 696 S.E.2d 411 (2010).

**Credibility determination for trier of fact.** — Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010).

**Notice to the state was insufficient.** — There was no error in refusing to admit a victim's prior conviction for purposes of impeachment because under the circumstances, which included very little, if any, "advance" notification and the state's claim that the state did not have time to prepare, the trial court did not abuse the court's discretion in finding that the notice to the state was not sufficient when the defendant's counsel served the state with the notice of intent to introduce the victim's conviction the day after the jury had been selected but before the presentation of evidence to the jury; given the lack of any facts and circumstances, absent speculation, that illegal drugs were involved in the altercation at issue, the trial court did not abuse the court's discretion in determining that irrespective of the timeliness of the notice, the prejudicial effect of the victim's prior conviction outweighed any probative value and that the evidence of the conviction was therefore inadmissible. Crowder v. State, 305 Ga. App. 647, 700 S.E.2d 642 (2010).

**Effective assistance of counsel.**

Defendant failed to establish that the defendant received ineffective assistance of trial counsel due to counsel's failure to provide the state with written notice of the defendant's intent to use evidence of a witness's prior conviction for impeachment purposes pursuant to O.C.G.A. § 24-9-84.1(b) because even if the conviction had been admitted and the jury had disregarded the witness's testimony, there remained evidence sufficient to convict the defendant; the witness's trial testimony conflicted with the witness's prior statements, and the witness admitted on the stand being a crack dealer. Lanier v. State, 288 Ga. 109, 702 S.E.2d 141 (2010).

Defendant did not show a reasonable probability that the trial would have ended differently if trial counsel had uncovered all the details about the victim's First Offender plea and cross-examined the victim about the victim's possible bias toward the state because five witnesses separately testified that the defendant assaulted the victims with a gun; thus, even if the jury decided to completely disregard the victim's testimony based on successful cross-examination, the testimony of four other eyewitnesses remained. Strong v. State, 308 Ga. App. 558, 707 S.E.2d 914 (2011).

Trial court's conclusion that trial counsel's failure to obtain certified copies of the victim's prior felony convictions and First Offender plea, which the defendant asserted would have been admissible to impeach the victim and show bias under O.C.G.A. § 24-9-84.1, did not constitute ineffective assistance was not clearly erroneous because counsel made a strategic decision not to expend the limited resources of the office to obtain the certified copies, choosing instead to focus on other avenues of defense. Strong v. State, 308 Ga. App. 558, 707 S.E.2d 914 (2011).

Trial counsel did not erroneously fail to

impeach a state's witness under O.C.G.A. § 24-9-84.1(a)(3) with evidence of the witness's prior misdemeanor convictions for theft by receiving stolen property and theft by taking because the defendant failed to show that the theft convictions would have been admitted for impeachment purposes at trial; the evidence the defendant presented at the motion for new trial hearing did not show that the misdemeanor theft convictions involved fraud or deceit within the meaning of § 24-9-84.1(a)(3). Boatright v. State, 308 Ga. App. 266, 707 S.E.2d 158 (2011).

Trial counsel was not ineffective for failing to impeach the victim with felony convictions under O.C.G.A. § 24-9-84.1 because the defendant did not show that, but for counsel's failure to introduce the victim's earlier convictions, there was a reasonable probability that the outcome of the trial would have been different; the victim was referred to as "not trustworthy" and "a thief" during the trial, and the victim's conviction for burglary was admitted and referenced repeatedly during the trial. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925 (2011).

Trial counsel was not ineffective for failing to object when the prosecuting attorney offered certified copies of the defendant's prior felony conviction to impeach the defendant's testimony under O.C.G.A. § 24-9-84.1(a) because the trial court properly could have concluded that the probative value of the conviction substantially outweighed any prejudicial effect so the failure to object was not unreasonable; the prior conviction was recent, probative of the defendant's credibility as a testifying witness, and involved conduct dissimilar to the burglary for which the defendant was on trial. Robinson v. State, 312 Ga. App. 110, 717 S.E.2d 694 (2011).

**Issue waived on appeal.** — Defendant waived for purposes of appeal defendant's claim that the defendant did not have to provide advance written notice to the state of defendant's intent to introduce the victim's prior conviction to impeach the victim since the conviction was not more than ten years old for purposes of O.C.G.A. § 24-9-84.1 because the defendant's trial counsel did not present that argument to the trial court but told the trial court that the defendant filed the notice of intent for the reason that the conviction was more than ten years in age; counsel then argued that defendant's advance written notice to the state was sufficient, but the defendant did not argue that the notice did not need to be given under § 24-9-84.1(b), and in light of trial counsel's actions, the defendant could not claim on appeal that the trial court erred in considering the sufficiency of the advance notice to the state for purposes of § 24-9-84.1(b). Crowder v. State, 305 Ga. App. 647, 700 S.E.2d 642 (2010).

Supreme court was precluded from reviewing on appeal the defendant's claim that the trial court violated O.C.G.A. § 24-9-84.1 by admitting into evidence the defendant's prior convictions for drug offenses and by failing to enter express findings in the record because although the defendant testified and admitted the drug convictions on direct examination, the record did not contain any previous motion in limine, objection, hearing, or ruling regarding the admissibility of those prior convictions; those omissions were not cured by trial counsel's testimony that, although counsel was not looking at the transcripts and was speaking strictly from memory, counsel had been under the impression that the prior convictions would come in, and even if the defendant had previously moved for exclusion of the prior convictions and a hearing had been held, the absence of any ruling on the record would take the case out of the usual rule that the record was preserved and the defendant was not required to object to the evidence during trial. Collier v. State, 288 Ga. 756, 707 S.E.2d 102 (2011).

Defendant could not claim on appeal that the trial court erred in considering the sufficiency of the advance notice to the state for purposes of O.C.G.A. § 24-9-84.1(b) because the trial court held that evidence of the victim's three older convictions was inadmissible since the convictions were more than ten years old, and the defendant had not provided written notice within ten days of trial; no objection was made to the trial court's ruling, and the defendant did not at any point argue that the convictions were less than ten years old. Askew v. State, 310 Ga. App. 746, 713 S.E.2d 925 (2011).

**Cited** in Gower v. State, 313 Ga. App. 635, 722 S.E.2d 383 (2012).

## 24-9-85. (Effective until January 1, 2013) Credit of impeached witness for jury generally; when testimony of impeached witness must be corroborated.

### JUDICIAL DECISIONS

Analysis

Contradiction or Bad Character
2. Function of Jury
False Swearing
2. Function of Jury

**Contradiction or Bad Character**

**2. Function of Jury**

**Credibility determination for trier of fact.** — Evidence was sufficient to support the defendant's conviction for forgery because whatever purported inconsistencies could have existed in a witness's testimony were for the finder of fact to weigh and pass upon, and the trial court found that although the witness was not the most credible of witnesses, the witness's testimony was an inculpatory statement against the witness's penal interests, and there was no reason not to believe the testimony; the trial court considered the validity of the witness's testimony in light of the impeaching evidence, and it was not within the purview of the court of appeals to upset that judgment. Martin v. State, 305 Ga. App. 764, 700 S.E.2d 871 (2010).

**False Swearing**

**2. Function of Jury**

**Corroboration is jury question.** Because there was no evidence that the only eyewitness to identify the defendant as being present at the scene of the crime acted with a manifest purpose to testify falsely, the eyewitness's credibility was an issue to be evaluated by the jury; the eyewitness's identification of the defendant was supported by circumstantial evidence. Sanders v. State, 290 Ga. 637, 723 S.E.2d 436 (2012).

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# CHAPTER 10

# SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE

**Article 6**

**Uniform Interstate Depositions and Discovery Act**

Sec.
24-10-110. (Effective until January 1, 2013) Short title.
24-10-111. (Effective until January 1, 2013) Definitions.
24-10-112. (Effective until January 1, 2013) Requirements of issuance of foreign subpoenas; application.
24-10-113. (Effective until January 1, 2013) Compelling foreign witness to appear and testify.
24-10-114. (Effective until January 1, 2014) Service of subpoena.
24-10-115. (Effective until January 1,

# ARTICLE 2

# SUBPOENAS AND NOTICE TO PRODUCE

## Part 1

## In General

### 24-10-21. (Effective until January 1, 2013) Subpoena for attendance of witnesses — Attendance at hearing or trial; where served.

#### JUDICIAL DECISIONS

**Determination of whether witness is necessary and material.** — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq., to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness is "necessary and material" is one of the determinations that must be made under the Act, O.C.G.A. § 24-10-92(b), by the judge in the county where the out-of-state witness is located, and the Georgia trial court evaluates the request under the Act, O.C.G.A. § 24-10-94, and must determine only whether the out-of-state witness is a "material witness" in the Georgia criminal prosecution and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

**Attendance by agent of out-of-state corporation.** — Court of appeals erred when the court concluded that a request under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq., that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011).

## ARTICLE 5

## UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE

### 24-10-90. (Effective until January 1, 2013) Short title.

#### JUDICIAL DECISIONS

**Wrong standard applied for refusing certificate.** — Trial court applied the wrong standard when the court refused to issue a certificate under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq., to secure the appearance of an out-of-state witness because the trial court concluded that the defendant failed to show that the witness was necessary and material, but the trial court simply had to determine whether a witness was "material." DiMauro v. State, 310 Ga. App. 526, 714 S.E.2d 105 (2011).

### 24-10-91. (Effective until January 1, 2013) Definitions.

#### JUDICIAL DECISIONS

**Determination of whether witness is necessary and material.** — It is the out-of-state judge who must decide whether the sought-after witness is necessary and material, not the requesting court in Georgia. The Georgia trial judge presented with a request for a certificate is charged with deciding whether the sought-after witness is a "material witness," under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-94(a); in light of the Uniform Act, O.C.G.A. § 24-10-97, "material witness" is construed as a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

### 24-10-92. (Effective until January 1, 2013) Criminal or grand jury proceeding in foreign state — Certificate of need for testimony; hearing; summons; custody and delivery; expenses; punishment for failure to attend and testify.

#### JUDICIAL DECISIONS

**Determination of whether witness is necessary and material.** — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq., to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness is "necessary and material" is one of the determinations that must be made under the Act, O.C.G.A. § 24-10-92(b), by the judge in the county where the out-of-state witness is located, and the Georgia trial court evaluates the request under the Act, O.C.G.A. § 24-10-94, and must determine only whether the out-of-state witness is a "material witness" in the Georgia criminal prosecution

and whether the court should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

It is the out-of-state judge who must decide whether the sought-after witness is necessary and material, not the requesting court in Georgia. The Georgia trial judge presented with a request for a certificate is charged with deciding whether the sought-after witness is a "material witness," Uniform Act, O.C.G.A. § 24-10-94(a); in light of the Uniform Act, O.C.G.A. § 24-10-97, "material witness" is construed as a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

**Out-of-state corporation.** — Court of appeals erred when the court concluded that a request under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq., that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia certificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011).

## 24-10-94. (Effective until January 1, 2013) Criminal or grand jury proceeding in this state — Issuance of certificate; presentation; tender of expenses; how long witness detained; punishment for failure to attend and testify.

### JUDICIAL DECISIONS

**Determination of whether witness is necessary and material.** — Court of appeals erred in ruling that the trial court did not abuse the court's discretion in denying the defendant's motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq., to obtain evidence possessed by a witness in Kentucky because the proper statute was not applied since the court of appeals stated that the defendant was required to show that the out-of-state witness was necessary and material to the case; whether the witness is "necessary and material" is one of the determinations that must be made under the Act, O.C.G.A. § 24-10-92(b), by the judge in the county where the out-of-state witness is located, and the Georgia trial court evaluates the request under the Act, O.C.G.A. § 24-10-94, and must determine only whether the out-of-state witness is a "material witness" in the Georgia criminal prosecution and whether it should issue the certificate requesting the out-of-state court to order the out-of-state witness to attend the criminal proceeding in Georgia. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

**Out-of-state corporation.** — Court of appeals erred when the court concluded that a request under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq., that an out-of-state corporation be required to produce purportedly material evidence in the corporation's possession had to be accompanied by the identification as a material witness of the corporate agent through which the corporation was to act because if the certificate of materiality was issued by the Georgia court, it was for the Kentucky corporation to identify the human agent through whom the corporation would act, perhaps in conjunction with the hearing that would be held in Kentucky upon receipt of the Georgia cer-

tificate of materiality. Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011).

Out-of-state corporation may be "a person" that is a material witness under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, O.C.G.A. § 24-10-90 et seq., and may be determined to be in possession of material evidence, and the expedient course is to permit a party to request that a corporation, rather than the corporation's human agent, be found to be a material witness under the Uniform Act and leave the issue of designation of the corporation's human agent to the corporation; the designation need not occur until after a certificate of materiality has been issued by the Georgia trial court and the court in the county in which the out-of-state corporation is located conducts a hearing which the corporation has been ordered to attend, on the request for issuance of a summons to appear at the Georgia trial with the material evidence purportedly in the corporation's possession under O.C.G.A. § 24-10-92(a). Yeary v. State, 289 Ga. 394, 711 S.E.2d 694 (2011).

### 24-10-97. (Effective until January 1, 2013) Construction; applicability.

#### JUDICIAL DECISIONS

**Cited** in Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011).

## ARTICLE 6

## UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

**Effective date.** — This article becomes effective July 1, 2012. See the editor's note for applicability and clarification.

**Editor's notes.** — This article formerly pertained to the Uniform Foreign Depositions Act. The former article was repealed by Ga. L. 2012, p. 651, § 1-1/HB 46, effective July 1, 2011. The former article consisted of Code Sections 24-10-110 through 24-10-112 and was based on Ga. L. 1959, p. 311, §§ 1—3.

Ga. L. 2012, p. 651, § 3-1/HB 46, approved by the Governor May 1, 2012, provided that the effective date of this article is July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of effective date provisions that precede the date of approval by the Governor. Ga. L. 2012, p. 651, § 3-1/HB 46, approved by the Governor May 1, 2012, provided that this article applies to subpoenas served on or after July 1, 2011, and in actions pending on or after July 1, 2011. See Op. Att'y Gen. No. 76-76 for construction of applicability provisions that precede the date of approval by the Governor.

### 24-10-110. (Effective until January 1, 2013) Short title.

This article shall be known and may be cited as the "Uniform Interstate Depositions and Discovery Act." (Code 1981, § 24-10-110, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

### 24-10-111. (Effective until January 1, 2013) Definitions.

As used in this article, the term:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Native American tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) Attend and give testimony at a deposition;

(B) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of such person; or

(C) Permit inspection of premises under the control of such person. (Code 1981, § 24-10-111, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

**24-10-112. (Effective until January 1, 2013) Requirements of issuance of foreign subpoenas; application.**

(a) To request issuance of a subpoena under this Code section, a party shall submit a foreign subpoena to the clerk of superior court of the county in which the person receiving the subpoena resides. A request for the issuance of a subpoena under this Code section shall not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of superior court in this state, the clerk shall promptly issue and provide to the requestor a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) of this Code section shall:

(1) Incorporate the terms used in the foreign subpoena; and

(2) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) This Code section shall only apply to a subpoena to be issued in this state if the foreign jurisdiction that issued the foreign subpoena

has adopted a version of the "Uniform Interstate Depositions and Discovery Act."

(e) This Code section shall not apply to criminal proceedings. (Code 1981, § 24-10-112, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

**24-10-113. (Effective until January 1, 2013) Compelling foreign witness to appear and testify.**

(a) For purposes of this Code section, the term "subpoena" shall have only the meaning set forth in subparagraph (A) of paragraph (5) of Code Section 24-10-111.

(b) In addition to the mechanism for issuing subpoenas provided for in Code Section 24-10-112, whenever any mandate, writ, or commission is issued out of any court of record in a foreign jurisdiction, a witness may be compelled by subpoena issued by the clerk of superior court of the county in which such witness resides to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state. (Code 1981, § 24-10-113, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

**24-10-114. (Effective until January 1, 2014) Service of subpoena.**

A subpoena issued by the clerk of superior court under Code Section 24-10-112 or 24-10-113 shall be served in compliance with Code Section 24-10-23 and shall be served within a reasonable time prior to the appearance required by such subpoena. (Code 1981, § 24-10-114, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

**24-10-115. (Effective until January 1, 2013) Applicability of Article 2 to certain provisions of this article.**

Part 1 of Article 2 of this chapter shall apply to subpoenas issued under Code Section 24-10-112 or 24-10-113. (Code 1981, § 24-10-115, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

**24-10-116. (Effective until January 1, 2013) Protective order or enforcement, quashing, or modification of subpoena.**

An application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of superior court under Code Section 24-10-112 or 24-10-113 shall comply with the statutes and court rules of this state and shall be submitted to the superior court of the county in which the subpoena was issued. (Code 1981, § 24-10-116, enacted by Ga. L. 2012, p. 651, § 1-1/HB 46.)

# TITLE 24

# EVIDENCE

Chap.

1. General Provisions, 24-1-1 through 24-1-106.
2. Judicial Notice, 24-2-201 through 24-2-221.
3. Parol Evidence, 24-3-1 through 24-3-10.
4. Relevant Evidence and its Limits, 24-4-401 through 24-4-417.
5. Privileges, 24-5-501 through 24-5-509.
6. Witnesses, 24-6-601 through 24-6-658.
7. Opinions and Expert Testimony, 24-7-701 through 24-7-707.
8. Hearsay, 24-8-801 through 24-8-826.
9. Authentication and Identification, 24-9-901 through 24-9-924.
10. Best Evidence Rule, 24-10-1001 through 24-10-1008.
11. Establishment of Lost Records, 24-11-1 through 24-11-29.
12. Medical and Other Confidential Information, 24-12-1 through 24-12-31.
13. Securing Attendance of Witnesses and Production and Preservation of Evidence, 24-13-1 through 24-13-154.
14. Proof Generally, 24-14-1 through 24-14-47.

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**Delayed effective date.** — Ga. L. 2011, p. 99, § 2/HB 24, repealed and reenacted Title 24, effective January 1, 2013, and Ga. L. 2012, p. 651, § 2-1/HB 46, repealed and reenacted Article 6, Chapter 10, Title 24, as enacted by Ga. L. 2011, p. 99, § 2/HB 24, effective January 1, 2013. For the version of Title 24 effective until January 1, 2013, consult the bound volume and the preceding versions appearing in the supplement. For the version effective January 1, 2013, see this version of Title 24.

**Editor's notes.** — Ga. L. 2011, p. 99, § 2/HB 24, and Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this title and enacted the current title. The former title consisted of §§ 24-1-1 through 24-1-5 (Chapter 1); 24-2-1 through 24-2-4 (Chapter 2); 24-3-1 through 24-3-18 (Article 1 of Chapter 3); 24-3-30 through 24-3-38 (Article 2 of Chapter 3); 24-3-50 through 24-3-53 (Article 3 of Chapter 3); 24-4-1 through 24-4-9 (Article 1 of Chapter 4); 24-4-20 through 24-4-27 (Article 2 of Chapter 4); 24-4-40 through 24-4-48 (Article 3 of Chapter 4); 24-4-60 through 24-4-65 (Article 4 of Chapter 4); 24-5-1 through 24-5-5 (Article 1 of Chapter 5); 24-5-20 through 24-5-33 (Article 2 of Chapter 5); 24-6-1 through

24-6-10 (Chapter 6); 24-7-1 through 24-7-9 (Article 1 of Chapter 7); 24-7-20 though 24-7-27 (Article 2 of Chapter 7); 24-8-1 through 24-8-6 (Article 1 of Chapter 8); 24-8-20 through 24-8-30 (Article 2 of Chapter 8); 24-9-1 through 24-9-7 (Article 1 of Chapter 9); 24-9-20 through 24-9-30 (Part 1, Article 2 of Chapter 9); 24-9-40 through 24-9-47 (Part 2, Article 2 of Chapter 9); 24-9-60 through 24-9-70 (Article 3 of Chapter 9); 24-9-80 through 24-9-85 (Article 4 of Chapter 9); 24-9-100 through 24-9-108 (Article 5 of Chapter 9); 24-10-1 through 24-10-7 (Article 1 of Chapter 10); 24-10-20 through 24-1-29 (Part 1, Article 2 of Chapter 10); 24-10-40 through 24-10-45 (Part 2, Article 2 of Chapter 10); 24-10-60 through 24-10-62 (Article 3 of Chapter 10); 24-10-70 through 24-10-76 (Article 4 of Chapter 10); 24-10-90 through 24-10-97 (Article 5 of Chapter 10); 24-10-110 through 24-10-116 (Article 6 of Chapter 10); 24-10-130 through 24-10-139 (Article 7 of Chapter 10); 24-10-150 through 24-10-154 (Article 8 of Chapter 10) and was based on Laws 1792, Cobb's 1851 Digest, p. 353; Laws 1799, Cobb's 1851 Digest, p. 276; Laws 1799, Cobb's 1851 Digest, p. 277; Laws 1799, Cobb's 1851 Digest, p. 463; Laws 1819, Cobb's 1851 Digest, p. 272; Laws 1829, Cobb's 1851 Digest, p. 278; Laws 1830, Cobb's 1851 Digest, p. 273; Laws 1836, Cobb's 1851 Digest, p. 273; Ga. L. 1841, p. 144, § 1; Laws 1841, Cobb's 1851 Digest, p. 465; Laws 1842, Cobb's 1851 Digest, p. 280; Laws 1850, Cobb's 1851 Digest, p. 280; Ga. L. 1855-56, p. 138, § 2; Ga. L. 1855-56, p. 143, § 1; Ga. L. 1855-56, p. 238, §§ 1 — 8; Ga. L. 1855-56, p. 255, § 1; Ga. L. 1858, p. 53, § 1; Ga. L. 1859, p. 18, § 1; Orig. Code 1863, §§ 3035, 3041 — 3044, 3051, 3437 — 3442, 3444, 3446, 3447, 3670 — 3699, 3701 — 3717, 3719, 3720, 3723 — 3731, 3737 — 3740, 3742 — 3745, 3747, 3749, 3753 — 3755, 3757 — 3766, 3768 — 3776, 3784 — 3800, 3888 — 3891, 3894, 3928, 4094; Code 1863, §§ 3721, 3741, 3744, 3745, 3765, 3767, 3768, 3772; 3884 — 3888, 3890, 3891; Ga. L. 1866, p. 138, §§ 1 — 4; Ga. L. 1866, p. 139, § 1; Ga. L. 1868, p. 24, § 1; Code 1868, §§ 3047, 3053 — 3056, 3063, 3446, 3457 — 3464, 3467, 3694 — 3723, 3725 — 3741, 3743 — 3745, 3747 — 3755, 3761 — 3769, 3771 — 3773, 3777 — 3779, 3781 — 3820, 3887, 3901, 3904 — 3911, 3914, 3916, 3951, 4123; Ga. L. 1873, p. 25, § 1; Ga. L. 1873, p. 35, § 1; Code 1873, §§ 3102, 3108, 3109, 3111, 3118, 3508 — 3515, 3517, 3518, 3747 — 3776, 3778 — 3794, 3796 — 3798, 3800 — 3808, 3814 — 3822, 3824, 3826, 3829 — 3833, 3835 — 3845, 3849 — 3876, 3980 — 3987, 3990, 3992, 4027, 4182, 4637; Ga. L. 1874, p. 22, § 1; Ga. L. 1876, p. 101, §§ 1, 2; Ga. L. 1877, p. 21, § 1; Ga. L. 1878-79, p. 53, § 1; Ga. L. 1878-79, p. 66, § 1; Ga. L. 1878-79, p. 151, § 1; Ga. L. 1880-81, p. 78, § 1; Ga. L. 1880-81, p. 121, § 1; Ga. L. 1882-83, p. 96, §§ 1 — 4; Ga. L. 1882-83, p. 106, §§ 1, 2; Ga. L. 1882-83, p. 135, § 1; Code 1882, §§ 3102, 3108 — 3111, 3118, 3508 — 3514, 3515, 3517, 3518, 3747 — 3776, 3778 — 3794, 3796, 3798, 3800 — 3808, 3814 — 3822, 3824, 3826, 3829 — 3832, 3834 — 3845, 3849 — 3876, 3980 — 3987, 3990, 3992, 3995a, 3995b, 4027, 4182, 4637; Ga. L. 1887, p. 30, § 1; Ga. L. 1887, p. 112, §§ 1 — 6; Ga. L. 1889, p. 85, § 1; Ga. L. 1890-91, p. 78, § 1; Ga. L. 1890-91, p. 107, §§ 1, 2; Ga. L. 1890-91, p. 109, § 1; Ga. L. 1892, p. 60, § 1; Ga. L. 1893, p. 38, § 1; Ga. L. 1893, p. 53, § 1; Ga. L. 1894, p. 49, § 1; Ga. L. 1895, p. 31, § 1; Ga. L. 1895, p. 41, § 2; Ga. L. 1895, p. 90, § 1; Civil Code 1895, §§ 3947, 3957 — 3962, 3975, 4743 — 4748, 4750, 4751, 4754, 4756 — 4758, 5141 — 5181, 5183 — 5199, 5201 — 5213, 5216 — 5221, 5223 — 5231, 5233, 5235 — 5256, 5258 — 5295, 5323 — 5328; Penal Code 1895, §§ 982 — 991, 993 — 1007, 1009 — 1028, 1115, 1187 — 1191, 1230; Ga. L. 1897, p. 53, § 1; Ga. L. 1897, p. 87, § 1; Ga. L. 1900, p. 57, § 1; Ga. L. 1900, p. 78, §§ 1, 2; Ga. L. 1907, p. 58, § 1; Civil Code 1910, §§ 4544, 4554 — 4559, 4572, 5312 — 5317, 5319, 5320, 5323, 5325 — 5327, 5727 — 5755, 5757 — 5768, 5770 — 5786, 5788 — 5800, 5803 — 5808, 5810 — 5818, 5820, 5822 — 5845, 5847 — 5884, 5918, 5919 — 5923; Penal Code 1910, §§ 1008 — 1017, 1019 — 1033, 1035 — 1054, 1144, 1180 — 1184, 1311; Ga. L. 1919, p. 235, § 1; Ga. L. 1921, p. 119, § 1; Ga. L. 1921, p. 184, § 3; Ga. L. 1924, p. 62, § 1; Ga. L. 1927, p. 145, § 1; Code 1933, §§ 38-101 — 38-123, 38-201, 38-202, 38-202.1, 38-203 — 38-208, 38-210 — 38-214, 38-301 — 38-309, 38-311 — 38-315, 38-401 — 38-412, 38-414 —

38-416, 38-418 — 38-420, 38-501 — 38-510, 38-601 — 38-603, 38-606 — 38-611, 38-613 — 38-621, 38-623, 38-625 — 38-630, 38-701 — 38-709, 38-801 — 38-807, 38-901, 38-902, 38-1001 — 38-1003, 38-1102, 38-1205, 38-1301, 38-1301a, 38-1302 — 38-1305, 38-1501 — 38-1507, 38-1601 — 38-1612, 38-1703 — 38-1712, 38-1801 — 38-1806, 38-1902, 38-2001 — 38-2005, 38-2401 — 38-2406, 50-123, 63-101, 63-102, 63-201 — 63-206, 63-208, 63-209, 63-302, 63-303, 81-1422; Ga. L. 1935, p. 120, § 1; Ga. L. 1939, p. 315, § 1; Ga. L. 1945, p. 227, § 1; 1945, p. 417, §§ 1-3; Ga. L. 1947, p. 568, § 1; Ga. L. 1950, p. 73, § 1; Ga. L. Ga. L. 1951, p. 468, §§ 1, 2; Ga. L. 1951, p. 596, § 1; Ga. L. 1952, p. 169, § 1; Ga. L. 1952, p. 177, §§ 1 — 3; Ga. L. 1953, Nov.-Dec. Sess., p. 212, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 288, § 2; Ga. L. 1953, Nov.-Dec. Sess., p. 319, § 1; Ga. L. 1953, Nov.-Dec. Sess., p. 484, § 1; Ga. L. 1956, p. 68, § 1; Ga. L. 1956, p. 161, § 31; Ga. L. 1957, p. 53, § 1; Ga. L. 1959, p. 190, § 1; Ga. L. 1962, p. 133, § 2; Ga. L. 1965, p. 250, § 1; Ga. L. 1966, p. 502, §§ 1, 2; Ga. L. 1968, p. 434, § 1; Ga. L. 1968, p. 1200, § 1; Ga. L. 1969, p. 607, § 1; Ga. L. 1970, p. 168, §§ 1, 3, 4; Ga. L. 1970, p. 225, § 1; Ga. L. 1971, p. 441, §§ 1 — 5; Ga. L. 1971, p. 460, § 1; Ga. L. 1973, p. 292, § 2; Ga. L. 1973, p. 299, §§ 1, 2; Ga. L. 1973, p. 547, § 1; Ga. L. 1974, p. 484, § 2; Ga. L. 1974, p. 595, §§ 1 — 5; Ga. L. 1975, p. 727, §§ 1, 2; Ga. L. 1976, p. 741, § 1; Ga. L. 1976, p. 1014, § 2; Ga. L. 1976, p. 1366, §§ 1 — 8; Ga. L. 1977, p. 226, § 1; Ga. L. 1977, p. 847, § 1; Ga. L. 1978, p. 925, § 1; Ga. L. 1978, p. 1657, § 1; Ga. L. 1978, p. 2000, § 1; Ga. L. 1979, p. 1261, §§ 1, 2; Ga. L. 1980, p. 70, §§ 1, 2; Ga. L. 1980, p. 426, § 1; Ga. L. 1980, p. 439, § 1; Ga. L. 1982, p. 982, §§ 1, 2; Ga. L. 1982, p. 1077, §§ 1, 3; Ga. L. 1982, p. 1187, §§ 1, 2; Ga. L. 1983, p. 3, § 17; Ga. L. 1983, p. 525, § 1; Ga. L. 1983, p. 852, §§ 1, 2; Ga. L. 1983, p. 884, §§ 3-23, 3-24; Ga. L. 1984, p. 22, § 24; Ga. L. 1984, p. 964, § 1; Ga. L. 1985, p. 149, § 24; Ga. L. 1985, p. 283, § 1; Ga. L. 1985, p. 407, § 1; Ga. L. 1985, p. 744, §§ 1, 2; Ga. L. 1986, p. 668, § 1; Ga. L. 1986, p. 982, § 8; Ga. L. 1986, p. 1090, § 1; Ga. L. 1986, p. 1277, §§ 2, 3; Ga. L. 1987, p. 3, § 24; Ga. L. 1987, p. 404, § 1; Ga. L. 1987, p. 595, § 1; Ga. L. 1987, p. 834, § 1; Ga. L. 1987, p. 1155, § 1; Ga. L. 1988, p. 470, § 2; Ga. L. 1988, p. 1732, § 1; Ga. L. 1988, p. 1799, § 6; Ga. L. 1989, p. 14, § 24; Ga. L. 1989, p. 272, § 1; Ga. L. 1989, p. 332, § 1; Ga. L. 1989, p. 1080, § 1; Ga. L. 1989, p. 1639, § 1; Ga. L. 1990, p. 167, § 1; Ga. L. 1990, p. 705, § 1; Ga. L. 1990, p. 1446, §§ 1, 2; Ga. L. 1990, p. 1795, § 1; Ga. L. 1991, p. 94, § 24; Ga. L. 1991, p. 773, §§ 1, 2; Ga. L. 1991, p. 787, § 1; Ga. L. 1992, p. 6, § 24; Ga. L. 1992, p. 2034, § 1; Ga. L. 1993, p. 1050, § 1; Ga. L. 1993, p. 1078, §§ 1, 2; Ga. L. 1994, p. 1895, §§ 5 — 11; Ga. L. 1995, p. 10, § 24; Ga. L. 1995, p. 858, § 1; Ga. L. 1995, p. 937, § 1; Ga. L. 1995, p. 1360, § 1; Ga. L. 1996, p. 315, § 1; Ga. L. 1996, p. 443, § 1; Ga. L. 1996, p. 795, §§ 1, 2; Ga. L. 1996, p. 1233, §§ 5, 6; Ga. L. 1996, p. 1306, § 16; Ga. L. 1997, p. 143, § 24; Ga. L. 1997, p. 851, § 3; Ga. L. 1997, p. 945, § 1; Ga. L. 1999, p. 516, § 1; Ga. L. 2000, p. 20, § 19; Ga. L. 2000, p. 1075, §§ 1 — 5; Ga. L. 2000, p. 1166, § 1; Ga. L. 2000, p. 1372, § 1; Ga. L. 2000, p. 1589, §§ 3, 4; Ga. L. 2001, p. 1219, § 1; Ga. L. 2004, p. 161, § 5; Ga. L. 2004, p. 466, §§ 5, 6; Ga. L. 2004, p. 485, § 1; Ga. L. 2005, p. 1, §§ 6, 7/SB 3; Ga. L. 2005, p. 20, §§ 13.1, 14, 15, 16/HB 170; Ga. L. 2005, p. 60, § 24/HB 95; Ga. L. 2005, p. 334, § 10A-1/HB 501; Ga. L. 2006, p. 72, § 24/SB 465; Ga. L. 2007, p. 408, § 1/HB 314; Ga. L. 2008, p. 12, §§ 2-4, 2-5/SB 433; Ga. L. 2008, p. 210, § 2/HB 1283; Ga. L. 2008, p. 252, § 1/SB 430; Ga. L. 2009, p. 453, §§ 1-4, 2-13/HB 228; Ga. L. 2010, p. 214, § 16/HB 567; Ga. L. 2010, p. 878, § 24/HB 1387; Ga. L. 2011, p. 705, §§ 5-5, 5-6/HB 214; Ga. L. 2012, p. 651, § 1-1/HB 46.

Ga. L. 2011, p. 99, § 1/HB 24, not codified by the General Assembly, provides that: "It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia. Where conflicts were found to exist among the decisions of the various circuit courts of appeal interpreting the federal rules of evidence, the General Assembly considered the decisions of the 11th Circuit Court of Appeals. It is the intent of the

General Assembly to revise, modernize, and reenact the general laws of this state relating to evidence while adopting, in large measure, the Federal Rules of Evidence. The General Assembly is cognizant that there are many issues regarding evidence that are not covered by the Federal Rules of Evidence and in those situations the former provisions of Title 24 have been retained. Unless displaced by the particular provisions of this Act, the General Assembly intends that the substantive law of evidence in Georgia as it existed on December 31, 2012, be retained."

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

## Revised Code Sections to Former Code Sections

This table lists each Code section in the delayed version of Title 24, effective January 1, 2013, and comparable provisions in the current version of Title 24, effective until January 1, 2013, and in the Federal Rules of Evidence.

| New Title 24 | Current Provisions |
|---|---|
| Chapter 1 | |
| Article 1 | |
| 24-1-1 | FRE 102, 24-1-2 |
| 24-1-2 | FRE 1101, 24-1-3 |
| Article 2 | |
| 24-1-101 | none |
| 24-1-102 | none |
| 24-1-103 | FRE 103 |
| 24-1-104 | FRE 104 |
| 24-1-105 | FRE 105 |
| 24-1-106 | FRE 106, 24-2-4 |
| Chapter 2 | |
| Article 1 | |
| 24-2-201 | FRE 201, 24-1-4 |
| Article 2 | |
| 24-2-220 | 24-1-4 |
| 24-2-221 | 24-7-22 |
| Chapter 3 | |
| 24-3-1 | 24-6-1 |
| 24-3-2 | 24-6-2 |
| 24-3-3 | 24-6-3 |
| 24-3-4 | 24-6-4 |
| 24-3-5 | 24-6-5 |
| 24-3-6 | 24-6-6 |
| 24-3-7 | 24-6-7 |
| 24-3-8 | 24-6-8 |
| 24-3-9 | 24-6-9 |
| 24-3-10 | 24-6-10 |
| Chapter 4 | |
| 24-4-401 | FRE 401, 24-2-1 |
| 24-4-402 | FRE 402, 24-2-1 |
| 24-4-403 | FRE 403, 24-2-1 |
| 24-4-404 | FRE 404, 24-2-2 |
| 24-4-405 | FRE 405, 24-2-2 |
| 24-4-406 | FRE 406 |
| 24-4-407 | FRE 407 |
| 24-4-408 | FRE 408, 24-3-37 |
| 24-4-409 | FRE 409 |
| 24-4-410 | FRE 410 |
| 24-4-411 | FRE 411 |
| 24-4-412 | 24-2-3 |
| 24-4-413 | FRE 413, 24-2-2, U.S.C.R. 31.3 |
| 24-4-414 | FRE 414, U.S.C.R. 31.3 |
| 24-4-415 | FRE 415 |
| 24-4-416 | 24-3-37.1 |
| 24-4-417 | FRE 404(b) |
| Chapter 5 | |
| 24-5-501 | 24-9-21, 24-9-24, 24-9-25, 24-9-27(c) |
| 24-5-502 | 24-9-22 |
| 24-5-503 | 24-9-23 |
| 24-5-504 | 24-9-26 |
| 24-5-505 | 24-9-27 |
| 24-5-506 | 24-9-20 |
| 24-5-507 | 24-9-28 |

| New Title 24 | Current Provisions |
|---|---|
| 24-5-508 | 24-9-30 |
| | |
| Chapter 6 | |
| Article 1 | |
| 24-6-601 | FRE 601, 24-9-1, 24-9-2, 24-9-4, 24-9-5(a), 24-9-6, 24-9-7 |
| 24-6-602 | FRE 602 |
| 24-6-603 | FRE 603, 24-9-5(b), 24-9-60(a) |
| 24-6-604 | FRE 604, 24-9-4 |
| 24-6-605 | FRE 605 |
| 24-6-606 | FRE 606 |
| 24-6-607 | FRE 607, 24-9-81 |
| 24-6-608 | FRE 608, 24-9-83, 24-9-84 |
| 24-6-609 | FRE 609, 24-9-84.1 |
| 26-6-610 | FRE 610, 24-9-3 |
| 24-6-611 | FRE 611, 24-9-62, 24-9-63, 24-9-64, 24-9-81 |
| 24-6-612 | FRE 612, 24-9-69 |
| 24-6-613 | FRE 613, 24-9-83 |
| 24-6-614 | FRE 614 |
| 24-6-615 | FRE 615, 24-9-61 |
| 26-6-616 | 24-9-61.1 |
| | |
| Article 2 | |
| 24-6-620 | 24-9-80 |
| 24-6-621 | 24-9-82 |
| 24-6-622 | 24-9-68 |
| 24-6-623 | 24-9-62 |
| | |
| Article 3 | |
| 24-6-650 | 24-9-100 |
| 24-6-651 | 24-9-101 |
| 24-6-652 | 24-9-102 |
| 24-6-653 | 24-9-103 |
| 24-6-654 | 24-9-104 |
| 24-6-655 | 24-9-105 |
| 24-6-656 | 24-9-106 |
| 24-6-657 | 24-9-107 |
| 24-6-658 | 24-9-108 |
| | |
| Chapter 7 | |
| 24-7-701 | FRE 701, 24-9-65, 24-9-66 |
| 24-7-702 | FRE 702, 24-9-67.1 |
| 24-7-703 | FRE 703, 24-9-67.1(a) |
| 24-7-704 | FRE 704 |
| 24-7-705 | FRE 705 |
| 24-7-706 | FRE 706 |
| 24-7-707 | 24-9-67 |
| | |
| Chapter 8 | |
| Article 1 | |
| 24-8-801 | FRE 801, 24-3-1, 24-3-2, 24-3-5, 24-3-15, 24-3-31, 24-3-36 |
| 24-8-802 | FRE 802, 24-3-1 |
| 24-8-803 | FRE 803, 24-3-3, 24-3-4, 24-3-9, 24-3-11, 24-3-12, 24-3-13, 24-3-14, 24-3-17(a), 24-9-69 |
| 24-8-804 | FRE 804, 24-3-7, 24-3-8, 24-3-10, 24-3-13, 24-3-35 |
| 24-8-805 | FRE 805 |
| 24-8-806 | FRE 806 |
| 24-8-807 | FRE 807, 24-3-1(b) |
| | |
| Article 2 | |
| 24-8-820 | 24-3-16 |
| 24-8-821 | 24-3-30 |
| 24-8-822 | 24-3-38 |
| 24-8-823 | 24-3-53 |
| 24-8-824 | 24-3-50 |
| 24-8-825 | 24-3-51 |
| 24-8-826 | 24-3-18 |
| | |
| Chapter 9 | |
| Article 1 | |
| 24-9-901 | FRE 901, 24-7-1, 24-7-6, 24-7-7 |
| 24-9-902 | FRE 902, 24-7-8, 24-7-20, 24-7-21, 24-7-23, 24-7-24(a)(1), 24-7-25, 24-7-26, 24-7-27 |
| 24-9-903 | FRE 903, 24-7-4, 24-7-5 |
| 24-9-904 | none |
| | |
| Article 2 | |
| 24-9-920 | 24-7-20 |
| 24-9-921 | 24-7-9 |
| 24-9-922 | 24-7-24, 24-7-25 |
| 24-9-923 | 24-4-48 |
| 24-9-924 | 24-3-17 |
| | |
| Chapter 10 | |
| 24-10-1001 | FRE 1001, 24-5-1 |

| New Title 24 | Current Provisions |
|---|---|
| 24-10-1002 | FRE 1002, 24-5-4 |
| 24-10-1003 | FRE 1003, 24-5-2, 24-5-3, 24-5-21 through 24-5-26, 24-5-29, 24-5-32 |
| 24-10-1004 | FRE 1004, 24-5-2, 24-5-3, 24-5-5, 24-5-21 through 24-5-24 |
| 24-10-1005 | FRE 1005, 24-5-20, 24-5-22, 24-5-24, 24-5-27, 24-5-28, 24-5-30, 24-5-31, 24-5-33 |
| 24-10-1006 | FRE 1006 |
| 24-10-1007 | FRE 1007, 24-7-3 |
| 24-10-1008 | FRE 1008, 24-7-2 |
| Chapter 11 | |
| Article 1 | |
| 24-11-1 | none |
| 24-11-2 | 24-8-1 through 24-8-3 |
| 24-11-3 | 24-8-4 through 24-8-6 |
| Article 2 | |
| 24-11-20 | 24-8-20 |
| 24-11-21 | 24-8-21 |
| 24-11-22 | 24-8-22 |
| 24-11-23 | 24-8-24 |
| 24-11-24 | 24-8-25 |
| 24-11-25 | 24-8-26 |
| 24-11-26 | 24-8-27 |
| 24-11-27 | 24-8-28 |
| 24-11-28 | 24-8-29 |
| 24-11-29 | 24-8-30 |
| Chapter 12 | |
| Article 1 | |
| 24-12-1 | 24-9-40 |
| 24-12-2 | 24-9-40.2 |
| Article 2 | |
| 24-12-10 | 24-9-41 |
| 24-12-11 | 24-9-42 |
| 24-12-12 | 24-9-43 |
| 24-12-13 | 24-9-44 |
| 24-12-14 | 24-9-45 |
| Article 3 | |
| 24-12-20 | 24-9-40.1 |
| 24-12-21 | 24-9-47 |
| Article 4 | |
| 24-12-30 | 24-9-46 |
| 24-12-31 | 24-9-29 |
| Chapter 13 | |
| Article 1 | |
| 24-13-1 | 24-10-1 |
| 24-13-2 | 24-10-2.1 |
| 24-13-3 | 24-10-3 |
| 24-13-4 | 24-10-4 |
| 24-13-5 | 24-10-5 |
| 24-13-6 | 24-10-6 |
| 24-13-7 | 24-10-7 |
| Article 2 | |
| 24-13-20 | 24-10-29 |
| 24-13-21 | 24-10-20, 24-10-21 |
| 24-13-22 | 24-10-21 |
| 24-13-23 | 24-10-22 |
| 24-13-24 | 24-10-23 |
| 24-13-25 | 24-10-24 |
| 24-13-26 | 24-10-25 |
| 24-13-27 | 24-10-26 |
| 24-13-28 | 24-10-27, 24-10-27.1 |
| 24-13-29 | 24-10-28 |
| Article 3 | |
| 24-13-60 | 24-10-60 |
| 24-13-61 | 24-10-61 |
| 24-13-62 | 24-10-62 |
| Article 4 | |
| 24-13-90 | 24-10-90 |
| 24-13-91 | 24-10-91 |
| 24-13-92 | 24-10-92 |
| 24-13-93 | 24-10-93 |
| 24-13-94 | 24-10-94 |
| 24-13-95 | 24-10-95 |
| 24-13-96 | 24-10-96 |
| 24-13-97 | 24-10-97 |
| Article 5 | |
| 24-13-110 | none |
| 24-13-111 | none |
| 24-13-112 | none |
| 24-13-113 | none |
| 24-13-114 | none |
| 24-13-115 | none |

| New Title 24 | Current Provisions |
|---|---|
| 24-13-116 | none |
| | |
| Article 6 | |
| 24-13-130 | 24-10-130 |
| 24-13-131 | 24-10-131 |
| 24-13-132 | 24-10-132 |
| 24-13-133 | 24-10-133 |
| 24-13-134 | 24-10-134 |
| 24-13-135 | 24-10-135 |
| 24-13-136 | 24-10-136 |
| 24-13-137 | 24-10-137 |
| 24-13-138 | 24-10-138 |
| 24-13-139 | 24-10-139 |
| | |
| Article 7 | |
| 24-13-150 | 24-10-150 |
| 24-13-151 | 24-10-151 |
| 24-13-152 | 24-10-152 |
| 24-13-153 | 24-10-153 |
| 24-13-154 | 24-10-154 |
| | |
| Chapter 14 | |
| Article 1 | |
| 24-14-1 | 24-4-1 |
| 24-14-2 | 24-4-2 |
| 24-14-3 | 24-4-3 |
| 24-14-4 | 24-4-4 |
| 24-14-5 | 24-4-5 |
| 24-14-6 | 24-4-6 |
| 24-14-7 | 24-4-7 |
| 24-14-8 | 24-4-8 |
| 24-14-9 | 24-4-9 |
| | |
| Article 2 | |
| 24-14-20 | 24-4-20 |
| 24-14-21 | 24-4-21 |
| 24-14-22 | 24-4-22 |
| 24-14-23 | 24-4-23 |
| 24-14-24 | 24-4-23.2 |
| 24-14-25 | 24-4-23.1 |
| 24-14-26 | 24-4-24 |
| 24-14-27 | 24-4-25 |
| 24-14-28 | 24-4-26 |
| 24-14-29 | 24-4-27 |
| | |
| Article 3 | |
| 24-14-40 | 24-4-40 |
| 24-14-41 | 24-4-41 |
| 24-14-42 | 24-4-42 |
| 24-14-43 | 24-4-43 |
| 24-14-44 | 24-4-44 |
| 24-14-45 | 24-4-45 |
| 24-14-46 | 24-4-46 |
| 24-14-47 | 24-4-47 |

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**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

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# CHAPTER 1

# GENERAL PROVISIONS

## Article 1

## Purpose and Applicability of Rules of Evidence

Sec.



## Article 2

## General Evidentiary Matters

Sec.

**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 1

## PURPOSE AND APPLICABILITY OF RULES OF EVIDENCE

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-1-1. (Effective January 1, 2013) Purpose and construction of the rules of evidence.

The object of all legal investigation is the discovery of truth. Rules of evidence shall be construed to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. (Code 1981, § 24-1-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-1-2. (Effective January 1, 2013) Applicability of the rules of evidence.

(a) The rules of evidence shall apply in all trials by jury in any court in this state.

(b) The rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections (c) and (d) of this Code section.

(c) The rules of evidence, except those with respect to privileges, shall not apply in the following situations:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104;

(2) Criminal proceedings before grand juries;

(3) Proceedings for extradition or rendition;

(4) Proceedings for revoking parole;

(5) Proceedings for the issuance of warrants for arrest and search warrants except as provided by subsection (b) of Code Section 17-4-40;

(6) Proceedings with respect to release on bond;

(7) Dispositional hearings and custody hearings in juvenile court; or

(8) Contempt proceedings in which the court, pursuant to subsection (a) of Code Section 15-1-4, may act summarily.

(d)(1) In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.

(2) In in rem forfeiture proceedings, the rules of evidence shall apply except that hearsay shall be admissible in determining probable cause or reasonable cause.

(3) In presentence hearings, the rules of evidence shall apply except that hearsay and character evidence shall be admissible.

(4) In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law.

(e) Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial. (Code 1981, § 24-1-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 2

## GENERAL EVIDENTIARY MATTERS

### 24-1-101. (Effective January 1, 2013) Reserved.

Reserved.

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Editor's notes.** — Ga. L. 2011, p. 99,

§ 2/HB 24, effective January 1, 2013, reserved the designation of this Code section.

### 24-1-102. (Effective January 1, 2013) Reserved.

Reserved.

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Editor's notes.** — Ga. L. 2011, p. 99, § 2/HB 24, effective January 1, 2013, reserved the designation of this Code section.

### 24-1-103. (Effective January 1, 2013) Rulings on evidence.

(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

(1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.

(b) The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer of proof in question and answer form.

(c) Jury proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, including, but not limited to, making statements or offers of proof or asking questions in the hearing of the jury.

(d) Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court. (Code 1981, § 24-1-103, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-1-104. (Effective January 1, 2013) Preliminary questions.

(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury.

(d) The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.

(e) This Code section shall not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. (Code 1981, § 24-1-104, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-1-105. (Effective January 1, 2013) Limited admissibility.

When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. (Code 1981, § 24-1-105, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-1-106. (Effective January 1, 2013) Introduction of remaining portions of writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement. (Code 1981, § 24-1-106, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

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## CHAPTER 2

## JUDICIAL NOTICE

**Article 1**

**Adjudicative Facts**

Sec.
24-2-201. (Effective January 1, 2013) Judicial notice of adjudicative facts.

**Article 2**

**Legislative Facts; Ordinances or Resolutions**

24-2-220. (Effective January 1, 2013) Judicial notice of legislative facts.

Sec.
24-2-221. (Effective January 1, 2013) Judicial notice of ordinance or resolution.

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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 1

ADJUDICATIVE FACTS

**24-2-201. (Effective January 1, 2013) Judicial notice of adjudicative facts.**

(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

(1) Generally known within the territorial jurisdiction of the court; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) A court may take judicial notice, whether or not requested by a party.

(d) A court shall take judicial notice if requested by a party and provided with the necessary information.

(e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

(f) Judicial notice may be taken at any stage of the proceeding.

(g)(1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

(2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (Code 1981, § 24-2-201, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 2

LEGISLATIVE FACTS; ORDINANCES OR RESOLUTIONS

**24-2-220. (Effective January 1, 2013) Judicial notice of legislative facts.**

The existence and territorial extent of states and their forms of government; all symbols of nationality; the laws of nations; all laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority; the laws of the United States and of the several states thereof as published by authority; the uniform rules of the courts; the administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6; the general customs of merchants; the admiralty and maritime courts of the world and their seals; the political makeup and history of this state and the federal government as well as the local divisions of this state; the seals of the several departments of the government of the United States and of the several states of the union; and all similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201. (Code 1981, § 24-2-220, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

**24-2-221. (Effective January 1, 2013) Judicial notice of ordinance or resolution.**

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of Code Section 24-9-902 and in the absence of contrary evidence, judicial notice may be taken of a certified copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body. (Code 1981, § 24-2-221, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article on the 2011 enactment of this Code section, see 28 Ga. St. U. L. Rev. 1 (2011).

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# CHAPTER 3

# PAROL EVIDENCE



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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U. L. Rev. 1 (2011).

## 24-3-1. (Effective January 1, 2013) Parol evidence contradicting writing inadmissible generally.

Parol contemporaneous evidence shall be generally inadmissible to contradict or vary the terms of a valid written instrument. (Code 1981, § 24-3-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## 24-3-2. (Effective January 1, 2013) Proof of unwritten portions of contract admissible where not inconsistent.

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove other portions

thereof not inconsistent with the writing; collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing. (Code 1981, § 24-3-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-3. (Effective January 1, 2013) Contemporaneous writings explaining each other; parol evidence explaining ambiguities.

(a) All contemporaneous writings shall be admissible to explain each other.

(b) Parol evidence shall be admissible to explain all ambiguities, both latent and patent. (Code 1981, § 24-3-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-4. (Effective January 1, 2013) Circumstances surrounding execution of contracts.

The surrounding circumstances shall always be proper subjects of proof to aid in the construction of contracts. (Code 1981, § 24-3-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-5. (Effective January 1, 2013) Known usage.

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents. (Code 1981, § 24-3-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-6. (Effective January 1, 2013) Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance.

Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance. (Code 1981, § 24-3-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-7. (Effective January 1, 2013) Proof of mistake in deed or written contract.

Parol evidence shall be admissible to prove a mistake in a deed or any other contract required by law to be in writing. (Code 1981, § 24-3-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-8. (Effective January 1, 2013) Original or subsequent voidness of writing.

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became void. (Code 1981, § 24-3-8, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-9. (Effective January 1, 2013) Explanation or denial of receipts.

Receipts for money shall always be only prima-facie evidence of payment and may be denied or explained by parol. (Code 1981, § 24-3-9, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-3-10. (Effective January 1, 2013) Explanation of blank endorsements.

Blank endorsements of negotiable paper may always be explained between the parties themselves or those taking with notice of dishonor or of the actual facts of such endorsements. (Code 1981, § 24-3-10, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

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## CHAPTER 4

## RELEVANT EVIDENCE AND ITS LIMITS

Sec.

**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-4-401. (Effective January 1, 2013) "Relevant evidence" defined.

As used in this chapter, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Code 1981, § 24-4-401, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-402. (Effective January 1, 2013) Relevant evidence generally admissible; irrelevant evidence not admissible.

All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible. (Code 1981, § 24-4-402, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Editor's notes.** — In light of the reenactment of this Title, effective January 1, 2013, the reader is advised to consult the annotations following Code Section 24-4-401, which may also be applicable to this Code section.

### 24-4-403. (Effective January 1, 2013) Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Code 1981, § 24-4-403, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

**24-4-404. (Effective January 1, 2013) Character evidence not admissible to prove conduct; exceptions; other crimes.**

(a) Evidence of a person's character or a trait of character shall not be admissible for the purpose of proving action in conformity therewith on a particular occasion, except for:

(1) Evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under paragraph (2) of this subsection, evidence of the same trait of character of the accused offered by the prosecution;

(2) Subject to the limitations imposed by Code Section 24-4-412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same; or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor; or

(3) Evidence of the character of a witness, as provided in Code Sections 24-6-607, 24-6-608, and 24-6-609.

(b) Evidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The prosecution in a criminal proceeding shall provide reasonable notice to the defense in advance of trial, unless pretrial notice is excused by the court upon good cause shown, of the general nature of any such evidence it intends to introduce at trial. Notice shall not be required when the evidence of prior crimes, wrongs, or acts is offered to prove the circumstances immediately surrounding the charged crime, motive, or prior difficulties between the accused and the alleged victim. (Code 1981, § 24-4-404, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**24-4-405. (Effective January 1, 2013) Methods of proving character.**

(a) In all proceedings in which evidence of character or a trait of character of a person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

(b) In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an

accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of Code Section 17-10-2.

(c) On cross-examination, inquiry shall be allowable into relevant specific instances of conduct. (Code 1981, § 24-4-405, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-406. (Effective January 1, 2013) Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice. (Code 1981, § 24-4-406, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-407. (Effective January 1, 2013) Subsequent remedial measures.

In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11. The provisions of this Code section shall not require the exclusion of evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted. (Code 1981, § 24-4-407, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-408. (Effective January 1, 2013) Compromises and offers to compromise.

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution. (Code 1981, § 24-4-408, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-409. (Effective January 1, 2013) Payment of medical and similar expenses.

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury shall not be admissible to prove liability for the injury. (Code 1981, § 24-4-409, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-410. (Effective January 1, 2013) Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided by law, evidence of the following shall not, in any judicial or administrative proceeding, be admissible against the criminal defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere;

(3) Any statement made in the course of any proceedings in which a guilty plea or a plea of nolo contendere was entered and was later withdrawn, vacated, or set aside; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which does not result in a plea of guilty or which results in a plea of guilty later withdrawn, vacated, or set aside;

provided, however, that the statements described in paragraphs (1) through (4) of this Code section shall be admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it or in a criminal proceeding for perjury or false statement if the statement was made by the accused under oath, on the record, and in the presence of counsel or after the accused voluntarily waived his or her right to counsel. (Code 1981, § 24-4-410, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-411. (Effective January 1, 2013) Liability insurance.

In all civil proceedings involving a claim for damages, evidence that a person was or was not insured against liability shall not be admissible except as provided in this Code section. This Code section shall not require the exclusion of evidence of insurance against liability in proceedings under Code Section 46-7-12 or when such evidence is offered for a relevant purpose, including, but not limited to, proof of agency, ownership, or control, and the court finds that the danger of unfair prejudice is substantially outweighed by the probative value of the evidence. (Code 1981, § 24-4-411, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Editor's notes.** — Code Section 46-7-12, referred to in this Code section, was repealed by Ga. L. 2012, p. 580, § 16/HB 865, effective July 1, 2012. For present comparable provisions, see Code Section 40-1-112.

**24-4-412. (Effective January 1, 2013) Complainant's past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions.**

(a) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for rape in violation of Code Section 16-6-1; aggravated assault with the intent to rape in violation of Code Section 16-5-21; aggravated sodomy or sodomy in violation of Code Section 16-6-2; statutory rape in violation of Code Section 16-6-3; aggravated child molestation or child molestation in violation of Code Section 16-6-4; incest in violation of Code Section 16-6-22; sexual battery in violation of Code Section 16-6-22.1; or aggravated sexual battery in violation of Code Section 16-6-22.2, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.

(c) The procedure for introducing evidence as described in subsection (b) of this Code section shall be as follows:

(1) At the time the defense seeks to introduce evidence which would be covered by subsection (b) of this Code section, the defense shall notify the court of such intent, whereupon the court shall conduct an in camera hearing to examine the accused's offer of proof;

(2) At the conclusion of the hearing, if the court finds that any of the evidence introduced at the hearing is admissible under subsection (b) of this Code section or is so highly material that it will substantially support a conclusion that the accused reasonably

believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence, the court shall by order state what evidence may be introduced by the defense at the trial of the case and in what manner the evidence may be introduced; and

(3) The defense may then introduce evidence pursuant to the order of the court. (Code 1981, § 24-4-412, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-413. (Effective January 1, 2013) Evidence of similar transaction crimes in sexual assault cases.

(a) In a criminal proceeding in which the accused is accused of an offense of sexual assault, evidence of the accused's commission of another offense of sexual assault shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the prosecution intends to offer evidence under this Code section, the prosecutor shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term "offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(2) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(3) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. (Code 1981, § 24-4-413, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Cross references.** — Notice of prosecution's intent to present evidence of similar transactions, Ga. Sup. Ct. R. 31.3.

## 24-4-414. (Effective January 1, 2013) Evidence of similar transaction crimes in child molestation cases.

(a) In a criminal proceeding in which the accused is accused of an offense of child molestation, evidence of the accused's commission of another offense of child molestation shall be admissible and may be considered for its bearing on any matter to which it is relevant.

(b) In a proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described under this Code section.

(d) As used in this Code section, the term "offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(1) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(2) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(3) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(4) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child. (Code 1981, § 24-4-414, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Cross references.** — Notice of prosecution's intent to present evidence of similar transactions, Ga. Sup. Ct. R. 31.3.

**24-4-415. (Effective January 1, 2013) Evidence of similar acts in civil or administrative proceedings concerning sexual assault or child molestation.**

(a) In a civil or administrative proceeding in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or an offense of child molestation, evidence of that party's commission of another offense of sexual assault or another offense of child molestation shall be admissible and may be considered as provided in Code Sections 24-4-413 and 24-4-414.

(b) A party who intends to offer evidence under this Code section shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least ten days in advance of trial, unless the time is shortened or lengthened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section.

(d) As used in this Code section, the term:

(1) "Offense of child molestation" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-4, 16-6-5, 16-12-100, 16-12-100.2, or 16-12-100.3;

(B) Any crime that involves contact between any part of the accused's body or an object and the genitals or anus of a child;

(C) Any crime that involves contact between the genitals or anus of the accused and any part of the body of a child; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child.

(2) "Offense of sexual assault" means any conduct or attempt or conspiracy to engage in:

(A) Conduct that would be a violation of Code Section 16-6-1, 16-6-2, 16-6-3, 16-6-5.1, 16-6-22, 16-6-22.1, or 16-6-22.2;

(B) Any crime that involves contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(C) Any crime that involves contact, without consent, between the genitals or anus of the accused and any part of another person's body; or

(D) Any crime that involves deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. (Code 1981, § 24-4-415, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-416. (Effective January 1, 2013) Statements of sympathy in medical malpractice cases.

(a) As used in this Code section, the term "health care provider" means any person licensed under Chapter 9, 10A, 11, 11A, 26, 28, 30, 33, 34, 35, 39, or 44 of Title 43 or any hospital, nursing home, home health agency, institution, or medical facility licensed or defined under Chapter 7 of Title 31. The term shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of such health care providers.

(b) In any claim or civil proceeding brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which is made by a health care provider or an employee or agent of a health care provider to the patient, a relative of the patient, or a representative of the patient and which relates to the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest. (Code 1981, § 24-4-416, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-4-417. (Effective January 1, 2013) Evidence of similar acts in prosecutions for violations of Code Section 40-6-391.

(a) In a criminal proceeding involving a prosecution for a violation of Code Section 40-6-391, evidence of the commission of another violation of Code Section 40-6-391 on a different occasion by the same accused shall be admissible when:

(1) The accused refused in the current case to take the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident;

(2) The accused refused in the current case to provide an adequate breath sample for the state administered test required by Code Section 40-5-55 and such evidence is relevant to prove knowledge, plan, or absence of mistake or accident; or

(3) The identity of the driver is in dispute in the current case and such evidence is relevant to prove identity.

(b) In a criminal proceeding in which the state intends to offer evidence under this Code section, the prosecuting attorney shall disclose such evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that the prosecuting attorney expects to offer, at least ten days in advance of trial, unless the time is shortened or pretrial notice is excused by the judge upon good cause shown.

(c) This Code section shall not be the exclusive means to admit or consider evidence described in this Code section. (Code 1981, § 24-4-417, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

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# CHAPTER 5

# PRIVILEGES

**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U. L. Rev. 1 (2011).

## 24-5-501. (Effective January 1, 2013) Certain communications privileged.

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

(1) Communications between husband and wife;

(2) Communications between attorney and client;

(3) Communications among grand jurors;

(4) Secrets of state;

(5) Communications between psychiatrist and patient;

(6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;

(7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;

(8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

(9) Communications between accountant and client as provided by Code Section 43-3-32.

(b) As used in this Code section, the term:

(1) "Psychotherapy" means the employment of psychotherapeutic techniques.

(2) "Psychotherapeutic techniques" shall have the same meaning as provided in Code Section 43-10A-3. (Code 1981, § 24-5-501, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-5-502. (Effective January 1, 2013) Communications to clergyman privileged.

Every communication made by any person professing religious faith, seeking spiritual comfort, or seeking counseling to any Protestant minister of the Gospel, any priest of the Roman Catholic faith, any priest of the Greek Orthodox Catholic faith, any Jewish rabbi, or any Christian or Jewish minister or similar functionary, by whatever name called, shall be deemed privileged. No such minister, priest, rabbi, or similar functionary shall disclose any communications made to him or her by any such person professing religious faith, seeking spiritual guidance, or seeking counseling, nor shall such minister, priest, rabbi, or similar functionary be competent or compellable to testify with reference to any such communication in any court. (Code 1981, § 24-5-502, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-5-503. (Effective January 1, 2013) Husband and wife as witnesses for and against each other in criminal proceedings.

(a) A husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceeding for or against each other.

(b) The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of subsection (a) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which:

(1) The husband or wife is charged with a crime against the person of a child under the age of 18, but such husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged;

(2) The husband or wife is charged with a crime against his or her spouse;

(3) The husband or wife is charged with causing physical damage to property belonging to the husband and wife or to their separate property; or

(4) The alleged crime against his or her current spouse occurred prior to the lawful marriage of the husband and wife. (Code 1981, § 24-5-503, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 105, § 1/HB 711.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**The 2012 amendment,** effective January 1, 2013, substituted the present provisions of subsection (b) for the former provisions, which read: "The privilege created by subsection (a) of this Code section or by corresponding privileges in paragraph (1) of subsection (a) of Code Section 24-5-501 or subsection (a) of Code Section 24-5-505 shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a child under the age of 18, but such husband or wife shall be compellable to give evidence only on the specific act for which the accused is charged."

## 24-5-504. (Effective January 1, 2013) Law enforcement officers testifying; home address.

Any law enforcement officer testifying in his or her official capacity in any criminal proceeding shall not be compelled to reveal his or her home address. Such officer may be required to divulge the business address of his or her employer, and the court may require any law enforcement officer to answer questions as to his or her home address whenever such fact may be material to any issue in the proceeding. (Code 1981, § 24-5-504, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## 24-5-505. (Effective January 1, 2013) Party or witness privilege.

(a) No party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate such party or witness or which shall tend to bring infamy, disgrace, or public contempt upon such party or witness or any member of such party or witness's family.

(b) Except in proceedings in which a judgment creditor or judgment creditor's successor in interest seeks postjudgment discovery involving a judgment debtor pursuant to Code Section 9-11-69, no party or witness shall be required to testify as to any matter which shall tend to work a forfeiture of his or her estate.

(c) No official persons shall be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment. (Code 1981, § 24-5-505, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Cross references.** — Prohibition against compelled self-incrimination, Ga. Const. 1983, Art. I, Sec. I, Para. XVI.

### 24-5-506. (Effective January 1, 2013) Privilege against self-incrimination; testimony of accused in criminal case.

(a) No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.

(b) If an accused in a criminal proceeding wishes to testify and announces in open court his or her intention to do so, the accused may so testify. If an accused testifies, he or she shall be sworn as any other witness and, except as provided in Code Sections 24-6-608 and 24-6-609, may be examined and cross-examined as any other witness. The failure of an accused to testify shall create no presumption against the accused, and no comment shall be made because of such failure. (Code 1981, § 24-5-506, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-5-507. (Effective January 1, 2013) Grant of immunity; contempt.

(a) Whenever in the judgment of the Attorney General or any district attorney the testimony of any person or the production of evidence of any kind by any person in any criminal proceeding before a court or grand jury is necessary to the public interest, the Attorney General or the district attorney may request in writing the superior court to order such person to testify or produce the evidence. Upon order of the court, such person shall not be excused on the basis of the privilege against self-incrimination from testifying or producing any evidence required, but no testimony or other evidence required under the order or any information directly or indirectly derived from such testimony or evidence shall be used against the person in any proceeding or prosecution for a crime or offense concerning which he or she testified or produced evidence under court order. However, such person may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing, or contempt committed in testifying or failing to testify or in producing or failing to produce evidence in accordance with the order but shall not be required to produce evidence that can be used in any other court of this state, the United States, or any other state. Any order entered under this Code section shall be entered of record in the minutes of the court so as to afford a permanent record thereof, and any testimony given by a person pursuant to such order shall be transcribed and filed for permanent record in the office of the clerk of the court.

(b) If a person refuses to testify after being granted immunity from prosecution and after being ordered to testify as set forth in this Code section, such person may be adjudged in contempt and committed to the county jail until such time as such person purges himself or herself of contempt by testifying as ordered without regard to the expiration of the grand jury. If the grand jury before which such person was ordered to testify has been dissolved, such person may purge himself or herself by testifying before the court. (Code 1981, § 24-5-507, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-5-508. (Effective January 1, 2013) Qualified privilege for news gathering or dissemination.

Any person, company, or other entity engaged in the gathering and dissemination of news for the public through any newspaper, book, magazine, radio or television broadcast, or electronic means shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant;

(2) Cannot be reasonably obtained by alternative means; and

(3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item. (Code 1981, § 24-5-508, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-5-509. (Effective January 1, 2013) Communications between victim of family violence or sexual assault and agents providing services to such victim; termination of privilege.

(a) As used in this Code section, the term:

(1) "Agent" means a current or former employee or volunteer of a program who has successfully completed a minimum of 20 hours of training in family violence and sexual assault intervention and prevention at a Criminal Justice Coordinating Council certified victim assistance program.

(2) "Family violence" shall have the same meaning as provided in Code Section 19-13-1.

(3) "Family violence shelter" means a program whose primary purpose is to provide services to family violence victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

(4) "Family violence victim" means a person who consults a family violence shelter for the purpose of securing advice or other services concerning an act of family violence, an alleged act of family violence, or an attempted act of family violence.

(5) "Government agency" means any agency of the executive, legislative, or judicial branch of government or political subdivision or authority thereof of this state, any other state, the District of Columbia, the United States and its territories and possessions, or any foreign government or international governmental or quasi-governmental agency recognized by the United States or by any of the several states.

(6) "Negative effect of the disclosure of the evidence on the victim" shall include the impact of the disclosure on the relationship between the victim and the agent and the delivery and accessibility of services.

(7) "Program" means a family violence shelter or rape crisis center.

(8) "Rape crisis center" means a program whose primary purpose is to provide services to sexual assault victims and their families that is not under the direct supervision of a law enforcement agency, prosecuting attorney's office, or a government agency.

(9) "Services" means any services provided to a victim by a program including but not limited to crisis hot lines, safe homes and shelters, assessment and intake, counseling, services for children who are victims of family violence or sexual assault, support in medical, administrative, and judicial systems, transportation, relocation, and crisis intervention. Such term shall not include mandatory reporting as required by Code Section 19-7-5 or 30-5-4.

(10) "Sexual assault" shall have the same meaning as provided in Code Section 17-5-70.

(11) "Sexual assault victim" means a person who consults a rape crisis center for the purpose of securing advice or other services concerning a sexual assault, an alleged sexual assault, or an attempted sexual assault.

(12) "Victim" means a family violence victim or sexual assault victim.

(b) No agent of a program shall be compelled to disclose any evidence in a judicial proceeding that the agent acquired while providing services to a victim, provided that such evidence was necessary to enable the agent to render services, unless the privilege has been waived by the victim or, upon motion by a party, the court finds by a preponderance of the evidence at a pretrial hearing or hearing outside the presence of the jury that:

(1) In a civil proceeding:

(A) The evidence sought is material and relevant to factual issues to be determined;

(B) The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim; or

(2) In a criminal proceeding:

(A) The evidence sought is material and relevant to the issue of guilt, degree of guilt, or sentencing for the offense charged or a lesser included offense;

(B) The evidence is not sought solely for the purpose of referring to the victim's character for truthfulness or untruthfulness; provided, however, that this subparagraph shall not apply to evidence of the victim's prior inconsistent statements;

(C) The evidence sought is not available or already obtained by the party seeking disclosure; and

(D) The probative value of the evidence sought substantially outweighs the negative effect of the disclosure of the evidence on the victim.

(c) If the court finds that the evidence sought may be subject to disclosure pursuant to subsection (b) of this Code section, the court shall order that such evidence be produced for the court under seal, shall examine the evidence in camera, and may allow disclosure of those portions of the evidence that the court finds are subject to disclosure under this Code section.

(d) The privilege afforded under this Code section shall terminate upon the death of the victim.

(e) The privilege granted by this Code section shall not apply if the agent was a witness or party to the family violence or sexual assault or other crime that occurred in the agent's presence.

(f) The mere presence of a third person during communications between an agent and a victim shall not void the privilege granted by this Code section, provided that the communication occurred in a setting when or where the victim had a reasonable expectation of privacy.

(g) If the victim is or has been judicially determined to be incompetent, the victim's guardian may waive the victim's privilege.

(h) In criminal proceedings, if either party intends to compel evidence based on this Code section, the party shall file and serve notice of his or her intention on the opposing party at least ten days prior to trial, or as otherwise directed by the court. The court shall hold a pretrial hearing in accordance with subsection (b) of this Code section and determine the issue prior to trial. (Code 1981, § 24-5-509, enacted by Ga. L. 2012, p. 105, § 2/HB 711.)

**Effective date.** — This Code section becomes effective January 1, 2013.

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# CHAPTER 6

# WITNESSES

## Article 1

## General Provisions

**Article 2**

**Credibility**



**Article 3**

**Use of Sign Language and Intermediary Interpreter in Administrative and Judicial Proceedings**



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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 1

## GENERAL PROVISIONS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-6-601. (Effective January 1, 2013) General rule of competency.

Except as otherwise provided in this chapter, every person is competent to be a witness. (Code 1981, § 24-6-601, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing

with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-6-602. (Effective January 1, 2013) Lack of personal knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of such matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. The provisions of this Code section are subject to Code Section 24-7-703 and shall not apply to party admissions. (Code 1981, § 24-6-602, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-603. (Effective January 1, 2013) Oath or affirmation.

(a) Before testifying, every witness shall be required to declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

(b) Notwithstanding the provisions of subsection (a) of this Code section, in all proceedings involving deprivation as defined by Code Section 15-11-2 and in all criminal proceedings in which a child was a victim of or witness to any crime, the child shall be competent to testify, and the child's credibility shall be determined as provided in this chapter. (Code 1981, § 24-6-603, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-604. (Effective January 1, 2013) Interpreters.

Except as provided in Code Sections 24-6-656 and 24-6-657 or by the rules promulgated by the Supreme Court of Georgia pursuant to Code Section 15-1-14, an interpreter shall be subject to the provisions of Code Section 24-7-702. Interpreters shall be required to take an oath or affirmation to make a true translation. (Code 1981, § 24-6-604, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-605. (Effective January 1, 2013) Judge as witness.

The judge presiding at the trial shall not testify in that trial as a witness. No objection need be made in order to preserve this issue. (Code 1981, § 24-6-605, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-606. (Effective January 1, 2013) Juror as witness.

(a) A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. If a juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Upon an inquiry into the validity of a verdict or indictment, a juror shall not testify by affidavit or otherwise nor shall a juror's statements be received in evidence as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the jury deliberations or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; provided, however, that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the juror's attention, whether any outside influence was improperly brought to bear upon any juror, or whether there was a mistake in entering the verdict onto the verdict form. (Code 1981, § 24-6-606, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-6-607. (Effective January 1, 2013) Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness. (Code 1981, § 24-6-607, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-608. (Effective January 1, 2013) Evidence of character and conduct of witness.

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness; and

(2) Evidence of truthful character shall be admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than a conviction of a crime as provided in Code Section 24-6-609, or conduct indicative of the witness's bias toward a party may not be proved by extrinsic evidence. Such instances may however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

(1) Concerning the witness's character for truthfulness or untruthfulness; or

(2) Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) The giving of testimony, whether by an accused or by any other witness, shall not operate as a waiver of the accused's or the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness. (Code 1981, § 24-6-608, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Law reviews.** — For article, "The Need For a Special Exception to the Hearsay Rule in Child Sexual Abuse Cases," see 21 Ga. St. B.J. 50 (1984). For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-6-609. (Effective January 1, 2013) Impeachment by evidence of conviction of a crime.

(a) **General rule.** For the purpose of attacking the character for truthfulness of a witness:

(1) Evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to the provisions of Code Section 24-4-403 if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the accused; or

(2) Evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of such crime required proof or admission of an act of dishonesty or making a false statement.

(b) **Time limit.** Evidence of a conviction under this Code section shall not be admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for such conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, shall not be admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, certificate of rehabilitation, or discharge from a first offender program.** Evidence of a final adjudication of guilt and subsequent discharge under any first offender statute shall not be used to impeach any witness and evidence of a conviction shall not be admissible under this Code section if:

(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Nolo contendere pleas and juvenile adjudications.** A conviction based on a plea of nolo contendere shall not be admissible to impeach any witness under this Code section. Evidence of juvenile adjudications shall not generally be admissible under this Code section. The court may, however, in a criminal proceeding allow evidence of a juvenile adjudication of a witness other than the accused if conviction of

the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence of the accused.

(e) **Pendency of appeal.** The pendency of an appeal shall not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admissible. (Code 1981, § 24-6-609, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-610. (Effective January 1, 2013) Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion shall not be admissible for the purpose of proving that by reason of the nature of the beliefs or opinions the witness's credibility is impaired or enhanced. (Code 1981, § 24-6-610, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-611. (Effective January 1, 2013) Mode and order of witness interrogation and presentation.

(a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(b) A witness may be cross-examined on any matter relevant to any issue in the proceeding. The right of a thorough and sifting cross-examination shall belong to every party as to the witnesses called against the party. If several parties to the same proceeding have distinct interests, each party may exercise the right to cross-examination.

(c) Leading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily leading questions shall be permitted on cross-examination. When a party calls a hostile witness, an adverse

party, or a witness identified with an adverse party, interrogation may be by leading questions. (Code 1981, § 24-6-611, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-612. (Effective January 1, 2013) Writing used to refresh memory.

(a) If a witness uses a writing to refresh his or her memory while testifying, an adverse party shall be entitled to have the writing produced at the hearing or trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness.

(b) If a witness uses a writing to refresh his or her memory before testifying at trial and the court in its discretion determines it is necessary in the interests of justice, an adverse party shall be entitled to have the writing produced at the trial, to inspect it, to cross-examine the witness on such writing, and to introduce in evidence those portions of such writing which relate to the testimony of the witness. If the writing used is protected by the attorney-client privilege or as attorney work product under Code Section 9-11-26, use of the writing to refresh recollection prior to the trial shall not constitute a waiver of that privilege or protection. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions of such writing not so related, and order delivery of the remainder of such writing to the party entitled to such writing. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to an order under this Code section, the court shall make any order justice requires; provided, however, that in criminal proceedings, when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial. (Code 1981, § 24-6-612, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-613. (Effective January 1, 2013) Prior statements of witnesses.

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.

(c) A prior consistent statement shall be admissible to rehabilitate a witness if the prior consistent statement logically rebuts an attack made on the witness's credibility. A general attack on a witness's credibility with evidence offered under Code Section 24-6-608 or 24-6-609 shall not permit rehabilitation under this subsection. If a prior consistent statement is offered to rebut an express or implied charge against the witness of recent fabrication or improper influence or motive, the prior consistent statement shall have been made before the alleged recent fabrication or improper influence or motive arose. (Code 1981, § 24-6-613, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-614. (Effective January 1, 2013) Calling and interrogation of witnesses by court.

(a) The court may, on its own motion, call a court appointed expert, call a witness regarding the competency of any party, or call a child witness or, at the suggestion of a party, call such witnesses, and all parties shall be entitled to cross-examine such witnesses. In all other situations, the court may only call witnesses when there is an agreement of all of the parties for the court to call such witnesses and all parties shall be entitled to cross-examine such witnesses.

(b) The court may interrogate witnesses whether called by itself pursuant to subsection (a) of this Code section or by a party.

(c) Objections to the calling of witnesses by the court or to interrogation by the court may be made at the time or at the next available

opportunity when the jury is not present. (Code 1981, § 24-6-614, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-615. (Effective January 1, 2013) Exclusion of witnesses.

Except as otherwise provided in Code Section 24-6-616, at the request of a party the court shall order witnesses excluded so that each witness cannot hear the testimony of other witnesses, and it may make the order on its own motion. This Code section shall not authorize exclusion of:

(1) A party who is a natural person;

(2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause. (Code 1981, § 24-6-615, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-6-616. (Effective January 1, 2013) Presence in courtroom of victim of criminal offense.

Subject to the provisions of Code Section 17-17-9, the victim of a criminal offense shall be entitled to be present in any court exercising jurisdiction over such offense. (Code 1981, § 24-6-616, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## CREDIBILITY

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-6-620. (Effective January 1, 2013) Credibility a jury question.

The credibility of a witness shall be a matter to be determined by the trier of fact, and if the case is being heard by a jury, the court shall give the jury proper instructions as to the credibility of a witness. (Code 1981, § 24-6-620, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-6-621. (Effective January 1, 2013) Impeachment by contradiction.

A witness may be impeached by disproving the facts testified to by the witness. (Code 1981, § 24-6-621, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-622. (Effective January 1, 2013) Witness's feelings and relationship to parties provable.

The state of a witness's feelings towards the parties and the witness's relationship to the parties may always be proved for the consideration of the jury. (Code 1981, § 24-6-622, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-623. (Effective January 1, 2013) Treatment of witness.

It shall be the right of a witness to be examined only as to relevant matters and to be protected from improper questions and from harsh or insulting demeanor. (Code 1981, § 24-6-623, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 3

## USE OF SIGN LANGUAGE AND INTERMEDIARY INTERPRETER IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-6-650. (Effective January 1, 2013) State policy on hearing impaired persons.

It is the policy of the State of Georgia to secure the rights of hearing impaired persons who, because of impaired hearing, cannot readily understand or communicate in spoken language and who consequently cannot equally participate in or benefit from proceedings, programs, and activities of the courts, legislative bodies, administrative agencies, licensing commissions, departments, and boards of this state and its political subdivisions unless qualified interpreters are available to assist such persons. (Code 1981, § 24-6-650, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-6-651. (Effective January 1, 2013) Definitions.

As used in this article, the term:

(1) "Agency" means any agency, authority, board, bureau, committee, commission, court, department, or jury of the legislative, judicial, or executive branch of government of this state or any political subdivision thereof.

(2) "Court qualified interpreter" means any person licensed as an interpreter for the hearing impaired pursuant to Code Section 15-1-14.

(3) "Hearing impaired person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken in a normal conversational tone.

(4) "Intermediary interpreter" means any person, including any hearing impaired person, who is able to assist in providing an accurate interpretation between spoken English and sign language or between the variance of sign language by acting as an intermediary between a hearing impaired person and a qualified interpreter.

(5) "Proceeding" means any meeting, hearing, trial, investigation, or other proceeding of any nature conducted by an agency.

(6) "Qualified interpreter" means any person certified as an interpreter for hearing impaired persons by the Registry of Interpreters for the Deaf or a court qualified interpreter. (Code 1981, § 24-6-651, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-652. (Effective January 1, 2013) Appointment of interpreters for hearing impaired persons interested in or witness at agency proceedings.

(a) The agency conducting any proceeding shall provide a qualified interpreter to the hearing impaired person:

(1) Whenever the hearing impaired person is a party to the proceeding or a witness before the proceeding; or

(2) Whenever a person who is below the age of 18 years is a party to the proceeding or a witness before the proceeding conducted by an agency whose parents are hearing impaired persons or whose guardian is a hearing impaired person.

(b) A hearing impaired person shall notify the agency not less than ten days, excluding weekends and holidays, prior to the date of the proceeding of the need for a qualified interpreter. If the hearing impaired person received notice of the proceeding less than ten days, excluding weekends and holidays, prior to the proceeding, such person shall notify the agency as soon as practicable after receiving such notice. (Code 1981, § 24-6-652, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-653. (Effective January 1, 2013) Procedure for interrogation and taking of statements from hearing impaired persons arrested for violation of criminal laws.

(a) An arresting law enforcement agency shall provide a qualified interpreter to any hearing impaired person whenever a hearing impaired person is arrested for allegedly violating any criminal law or ordinance of this state or any political subdivision thereof.

(b)(1) Except as provided in paragraph (2) of this subsection, no interrogation, warning, informing of rights, taking of statements, or other investigatory procedures shall be undertaken upon a hearing impaired person unless a qualified interpreter has been provided or the law enforcement agency has taken such other steps as may be reasonable to accommodate such person's disability. No answer, statement, admission, or other evidence acquired through the interrogation of a hearing impaired person shall be admissible in any criminal or quasi-criminal proceedings unless such was knowingly and voluntarily given. No hearing impaired person who has been taken into custody and who is otherwise eligible for release shall be detained because of the unavailability of a qualified interpreter.

(2) If a qualified interpreter is not available, an arresting officer may interrogate or take a statement from such person, provided that if the hearing impaired person cannot hear spoken words with a hearing aid or other sound amplification device, such interrogation and answers thereto shall be in writing and shall be preserved and turned over to the court in the event such person is tried for the alleged offense. (Code 1981, § 24-6-653, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-654. (Effective January 1, 2013) Indigent hearing impaired defendants to be provided with interpreters.

(a) A court shall provide a court qualified interpreter to any hearing impaired person whenever the hearing impaired person has been provided with a public defender or court appointed legal counsel.

(b) The court qualified interpreter authorized by this Code section shall be present at all times when the hearing impaired person is consulting with legal counsel. (Code 1981, § 24-6-654, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-655. (Effective January 1, 2013) Waiver of right to interpreter.

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, such person may waive the right to the use of such interpreter. Any such waiver shall be in writing and shall be approved by the agency or law enforcement agency before which the

hearing impaired person is to appear. In no event shall the failure of a hearing impaired person to request an interpreter be deemed to be a waiver of the hearing impaired person's right to a qualified interpreter. (Code 1981, § 24-6-655, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-656. (Effective January 1, 2013) Replacement of interpreters unable to communicate accurately with hearing impaired persons; appointment of intermediary interpreters.

Whenever a hearing impaired person shall be authorized to be provided a qualified interpreter, the agency or law enforcement agency shall determine whether the qualified interpreter so provided is able to communicate accurately with and translate information to and from the hearing impaired person. If it is determined that the qualified interpreter cannot perform these functions, the agency or law enforcement agency shall obtain the services of another qualified interpreter or shall appoint an intermediary interpreter to assist the qualified interpreter in communicating with the hearing impaired person. (Code 1981, § 24-6-656, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-657. (Effective January 1, 2013) Oath of interpreters; privileged communications; taping and filming of hearing impaired persons' testimony.

(a) Prior to providing any service to a hearing impaired person, any qualified interpreter or intermediary interpreter shall subscribe to an oath that he or she will interpret all communications in an accurate manner to the best of his or her skill and knowledge. The Supreme Court of Georgia may by rule of court prescribe the form of the oath for interpreters and intermediary interpreters for use in court and other judicial proceedings.

(b) Whenever a hearing impaired person communicates with any other person through the use of an interpreter and under circumstances which make such communications privileged or otherwise confidential, the presence of the interpreter shall not vitiate such privilege and the interpreter shall not be required to disclose the contents of such communication.

(c) Whenever a qualified interpreter is required by this article, the agency or law enforcement agency shall not begin the proceeding or take any action until such interpreter is in full view of and spatially situated so as to assure effective communication with the hearing impaired person.

(d) The agency or law enforcement agency may, upon its own motion or upon motion of any party, witness, or participant, order that the testimony of the hearing impaired person be electronically and visually recorded. Any such recording may be used to verify the testimony given by the hearing impaired person. (Code 1981, § 24-6-657, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-6-658. (Effective January 1, 2013) Compensation of interpreters.

Any qualified interpreter or intermediary interpreter providing service under this article shall be compensated by the agency or law enforcement agency requesting such service. (Code 1981, § 24-6-658, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

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## CHAPTER 7

## OPINIONS AND EXPERT TESTIMONY

**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-7-701. (Effective January 1, 2013) Lay witness opinion testimony.

(a) If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness;

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

(3) Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.

(b) Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion. (Code 1981, § 24-7-701, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-7-702. (Effective January 1, 2013) Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact.

(c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in which such expert was practicing or teaching in the profession at such time; and

(2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

(B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

(C) Except as provided in subparagraph (D) of this paragraph:

(i) Is a member of the same profession;

(ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or

(iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or

instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50. (Code 1981, § 24-7-702, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-7-703. (Effective January 1, 2013) Bases of expert opinion testimony.

The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in

order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. (Code 1981, § 24-7-703, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-7-704. (Effective January 1, 2013) Ultimate issue opinion.

(a) Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of an accused in a criminal proceeding shall state an opinion or inference as to whether the accused did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone. (Code 1981, § 24-7-704, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-7-705. (Effective January 1, 2013) Disclosure of facts or data underlying expert opinion.

An expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination. (Code 1981, § 24-7-705, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-7-706. (Effective January 1, 2013) Court appointed experts.

Except as provided in Chapter 7 of Title 9 or Code Section 17-7-130.1, 17-10-66, 29-4-11, 29-5-11, 31-14-3, 31-20-3, 44-6-166.1, 44-6-184, or 44-6-187, the following procedures shall govern the appointment,

compensation, and presentation of testimony of court appointed experts:

(1) The court on its own motion or on the motion of any party may enter an order to show cause why any expert witness should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. Each appointed expert witness shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. Each appointed expert witness shall advise the parties of his or her findings, if any. Except as provided in Article 3 of Chapter 12 or Article 6 of Chapter 13 of this title, such witness's deposition may be taken by any party. Such witness may be called to testify by the court or any party. Each expert witness shall be subject to cross-examination by each party, including a party calling the witness;

(2) Appointed expert witnesses shall be entitled to reasonable compensation in whatever sum the court allows. The compensation fixed shall be payable from funds which may be provided by law in criminal proceedings and civil proceedings involving just compensation for the taking of property. In other civil proceedings, the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs;

(3) In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness; and

(4) Nothing in this Code section shall limit a party in calling expert witnesses of the party's own selection. (Code 1981, § 24-7-706, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 97, § 3/HB 744.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**The 2012 amendment,** effective January 1, 2013, substituted "44-6-166.1, 44-6-184, or 44-6-187," for "or 44-6-166.1," near the middle of the introductory paragraph.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2011, "and proceedings" was deleted following "civil proceedings" in the second sentence of paragraph (2).

**Editor's notes.** — Ga. L. 2012, p. 97, § 1/HB 744, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Uniform Partition of Heirs Property Act.'"

### 24-7-707. (Effective January 1, 2013) Expert opinion testimony in criminal proceedings.

In criminal proceedings, the opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses. (Code 1981, § 24-7-707, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

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## CHAPTER 8

## HEARSAY

**Article 1**

**General Provisions**



**Article 2**

**Admissions and Confessions**



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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

ARTICLE 1

GENERAL PROVISIONS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

**24-8-801. (Effective January 1, 2013) Definitions.**

As used in this chapter, the term:

(a) "Statement" means:

(1) An oral or written assertion; or

(2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) "Declarant" means a person who makes a statement.

(c) "Hearsay" means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) "Hearsay" shall be subject to the following exclusions and conditions:

(1) **Prior statement by witness.**

(A) An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter.

(B) If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code Section 24-6-613.

(C) A statement shall not be hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; and

(2) **Admissions by party-opponent.**

Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is:

(A) The party's own statement, in either an individual or representative capacity;

(B) A statement of which the party has manifested an adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.

The contents of the statement shall be considered but shall not alone be sufficient to establish the declarant's authority under subparagraph (C) of this paragraph, the agency or employment relationship and scope thereof under subparagraph (D) of this paragraph, or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subparagraph (E) of this paragraph.

(e) "Public office" means:

(1) Every state department, agency, board, bureau, commission, division, public corporation, and authority;

(2) Every county, municipal corporation, school district, or other political subdivision of this state;

(3) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; and

(4) Every city, county, regional, or other authority established pursuant to the laws of this state.

(f) "Public official" means an elected or appointed official.

(g) "Public record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form and created in the course of the operation of a public office. (Code 1981, § 24-8-801, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-802. (Effective January 1, 2013) Hearsay rule.

Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible. (Code 1981, § 24-8-802, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-8-803. (Effective January 1, 2013) Hearsay rule exceptions; availability of declarant immaterial.

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant's will and not including a statement of belief as to the intent of another person;

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has

insufficient recollection to enable the witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

(6) **Records of regularly conducted activity.** Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

(7) **Absence of entry in records kept in accordance with paragraph (6) of this Code section.** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) **Public records and reports.** Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings, matters observed by police officers and other law enforcement personnel in connection with an investigation; or

(C) In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(10) **Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) **Records of religious organizations.** Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable law authorizes the recording of documents of that kind in such office;

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the

document was made have been inconsistent with the truth of the statement or the purport of the document;

(16) **Statements in ancient documents.** Statements in a document in existence 20 years or more the authenticity of which is established;

(17) **Market reports and commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness's particular occupation;

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history;

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community;

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

(23) **Judgment as to personal, family, or general history or boundaries.** Judgments as proof of matters of personal, family, or

general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation. (Code 1981, § 24-8-803, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-804. (Effective January 1, 2013) Hearsay rule exceptions; declarant unavailable.

(a) As used in this Code section, the term "unavailable as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

(2) In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;

(3) A statement against interest. A statement against interest is a statement:

(A) Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and

(B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

(4) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(5) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. (Code 1981, § 24-8-804, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-805. (Effective January 1, 2013) Hearsay within hearsay.

Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. (Code 1981, § 24-8-805, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-806. (Effective January 1, 2013) Attacking and supporting credibility of a declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, shall not be subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party shall be entitled to examine the declarant on the statement as if under cross-examination. (Code 1981, § 24-8-806, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-807. (Effective January 1, 2013) Residual exception.

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

(1) The statement is offered as evidence of a material fact;

(2) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(3) The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Code 1981, § 24-8-807, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## ADMISSIONS AND CONFESSIONS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-8-820. (Effective January 1, 2013) Testimony as to child's description of sexual contact or physical abuse.

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another shall be admissible in evidence by the testimony of the person to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability. (Code 1981, § 24-8-820, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-8-821. (Effective January 1, 2013) Admissions in pleadings.

Without offering the same in evidence, either party may avail himself or herself of allegations or admissions made in the pleadings of the other. (Code 1981, § 24-8-821, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-822. (Effective January 1, 2013) Right to have whole conversation heard.

When an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and all the conversation connected therewith admitted into evidence. (Code 1981, § 24-8-822, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-823. (Effective January 1, 2013) Admissions and confessions received with care; no conviction on uncorroborated confession.

All admissions shall be scanned with care, and confessions of guilt shall be received with great caution. A confession alone, uncorroborated by any other evidence, shall not justify a conviction. (Code 1981, § 24-8-823, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-824. (Effective January 1, 2013) Only voluntary confessions admissible.

To make a confession admissible, it shall have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. (Code 1981, § 24-8-824, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-825. (Effective January 1, 2013) Confessions under spiritual exhortation, promise of secrecy, or collateral benefit admissible.

The fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it. (Code 1981, § 24-8-825, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-8-826. (Effective January 1, 2013) Medical reports in narrative form.

(a) Upon the trial of any civil proceeding involving injury or disease, any medical report in narrative form which has been signed and dated by an examining or treating licensed physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic,

psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist shall be admissible and received in evidence insofar as it purports to represent the history, examination, diagnosis, treatment, prognosis, or interpretation of tests or examinations, including the basis therefor, by the person signing the report, the same as if that person were present at trial and testifying as a witness; provided, however, that such report and notice of intention to introduce such report shall first be provided to the adverse party at least 60 days prior to trial. A statement of the qualifications of the person signing such report may be included as part of the basis for providing the information contained therein, and the opinion of the person signing the report with regard to the etiology of the injury or disease may be included as part of the diagnosis. Any adverse party may object to the admissibility of any portion of the report, other than on the ground that it is hearsay, within 15 days of being provided with the report. Further, any adverse party shall have the right to cross-examine the person signing the report and provide rebuttal testimony. The party tendering the report may also introduce testimony of the person signing the report for the purpose of supplementing the report or otherwise.

(b) The medical narrative shall be presented to the jury as depositions are presented to the jury and shall not go out with the jury as documentary evidence. (Code 1981, § 24-8-826, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

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# CHAPTER 9

# AUTHENTICATION AND IDENTIFICATION

## Article 1

## General Provisions

Sec.



## Article 2

## Specific Types of Records and Evidence

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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 1

## GENERAL PROVISIONS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-9-901. (Effective January 1, 2013) Requirement of authentication or identification.

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

(1) Testimony of a witness with knowledge that a matter is what it is claimed to be;

(2) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

(3) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. Such specimens shall be furnished to the opposite party no later than ten days prior to trial;

(4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(7) Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

(8) Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence 20 years or more at the time it is offered;

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or

(10) Any method of authentication or identification provided by law. (Code 1981, § 24-9-901, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

## 24-9-902. (Effective January 1, 2013) Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof or the Panama Canal Zone or the Trust Territory of the Pacific Islands or of a political subdivision, department, officer, or agency thereof or of a municipal corporation of this state and bearing a signature purporting to be an attestation or execution;

(2) A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this Code section having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

(3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make such execution or attestation and accompanied by a final certification as to the genuineness of the signature, official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to such execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to such execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that such documents be treated as presumptively authentic without final certification or permit such documents to be evidenced by an attested summary with or without final certification;

(4) A duplicate of an official record or report or entry therein or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United States or of this state, including Code Section 24-9-920;

(5) Books, pamphlets, or other publications purporting to be issued by a public office;

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

(10) Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic;

(11) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration; or

(12) In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration. (Code 1981, § 24-9-902, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-9-903. (Effective January 1, 2013) Subscribing witness's testimony.

The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. (Code 1981, § 24-9-903, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-9-904. (Effective January 1, 2013) Definitions.

As used in this article, the term:

(1) "Public office" shall have the same meaning as set forth in Code Section 24-8-801.

(2) "Public officer" means any person appointed or elected to be the head of any entity included in paragraph (1) of Code Section 24-9-902.

(3) "Telephone service provider" shall have the same meaning as "voice service provider" as set forth in Code Section 46-5-231. (Code 1981, § 24-9-904, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## SPECIFIC TYPES OF RECORDS AND EVIDENCE

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-9-920. (Effective January 1, 2013) Authentication of Georgia state and county records.

The certificate or attestation of any public officer either of this state or any county thereof or any clerk or keeper of county, consolidated

government, or municipal records in this state shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in such public officer's respective office, or pertaining thereto, to admit the same in evidence. (Code 1981, § 24-9-920, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

## 24-9-921. (Effective January 1, 2013) Identification of medical bills; expert witness unnecessary.

(a) Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

(1) A hospital;

(2) An ambulance service;

(3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or

(4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.

(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence. (Code 1981, § 24-9-921, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-9-922. (Effective January 1, 2013) Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public offices in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken. (Code 1981, § 24-9-922, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-9-923. (Effective January 1, 2013) Authentication of photographs, motion pictures, video recordings, and audio recordings when witness unavailable.

(a) As used in this Code section, the term "unavailability of a witness" includes situations in which the authenticating witness:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;

(2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness shall not be deemed unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based

on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered, provided that, prior to the admission of such evidence, the date and time of such photograph, motion picture, or video recording shall be contained on such evidence, and such date and time shall be shown to have been made contemporaneously with the events depicted in such photograph, motion picture, or video recording.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, video recordings, and audio recordings but shall be supplementary to any other law and lawful methods existing in this state. (Code 1981, § 24-9-923, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-9-924. (Effective January 1, 2013) Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

(a) Any court may receive and use as evidence in any proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

(b) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information. (Code 1981, § 24-9-924, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

# CHAPTER 10

# BEST EVIDENCE RULE



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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011). For article on the 2011 enactment of this chapter, see 28 Ga. St. U. L. Rev. 1 (2011).

## 24-10-1001. (Effective January 1, 2013) Definitions.

As used in this chapter, the term:

(1) "Writing" or "recording" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

(2) "Photograph" includes still photographs, X-ray films, video recordings, and motion pictures.

(3) "Original" means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) "Duplicate" means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

(5) "Public record" shall have the same meaning as set forth in Code Section 24-8-801. (Code 1981, § 24-10-1001, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-10-1002. (Effective January 1, 2013) Requirement of original.

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required. (Code 1981, § 24-10-1002, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-10-1003. (Effective January 1, 2013) Admissibility of duplicates.

A duplicate shall be admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original. (Code 1981, § 24-10-1003, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-10-1004. (Effective January 1, 2013) Admissibility of other evidence of contents of a writing, recording, or photograph.

The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) No original can be obtained by any available judicial process or procedure;

(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) The writing, recording, or photograph is not closely related to a controlling issue. (Code 1981, § 24-10-1004, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-10-1005. (Effective January 1, 2013) Public records.

The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. (Code 1981, § 24-10-1005, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-10-1006. (Effective January 1, 2013) Summaries.

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court. (Code 1981, § 24-10-1006, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-10-1007. (Effective January 1, 2013) Testimony or written admission of party.

The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original. (Code 1981, § 24-10-1007, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-10-1008. (Effective January 1, 2013) Functions of court and jury.

When the admissibility of other evidence of the contents of writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code Section 24-1-104; provided, however, that when an issue is raised as to:

(1) Whether the asserted writing, recording, or photograph ever existed;

(2) Whether another writing, recording, or photograph produced at the trial is the original; or

(3) Whether other evidence of the contents correctly reflects the contents,

the issue is for the trier of fact to determine as in the case of other issues of fact. (Code 1981, § 24-10-1008, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

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## CHAPTER 11

## ESTABLISHMENT OF LOST RECORDS

### Article 1

### Public Records



### Article 2

### Private Papers

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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 1

## PUBLIC RECORDS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-11-1. (Effective January 1, 2013) Definitions.

As used in this chapter, the term:

(1) "Custodian" means the person charged with the duty of maintaining public records.

(2) "Duplicate" means a counterpart which accurately reproduces the original.

(3) "Public record" shall have the same meaning as set forth in Code Section 24-8-801. (Code 1981, § 24-11-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-2. (Effective January 1, 2013) Establishment of lost records.

(a) Where any original public records have been lost, mutilated, stolen, or destroyed, the custodian may establish duplicates in accordance with the provisions of this article. When such public records are established by duplicates, they shall have all of the effect in evidence as the original records would have had.

(b) The custodian of the lost, mutilated, stolen, or destroyed public records shall bring a petition to establish such records in the superior court of the county in which the public records were located.

(c) The petition shall set forth the fact that some portion of the public records has been lost, mutilated, stolen, or destroyed, specifying as nearly as may be possible the books or parts of the books in which those records existed, and shall pray for the establishment of such records. (Code 1981, § 24-11-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-3. (Effective January 1, 2013) Appointment of auditor; hearing; establishment of duplicates.

(a) The court shall either appoint an auditor for such petition in accordance with Chapter 7 of Title 9 or shall conduct a hearing on the petition. If an auditor is appointed, the provisions of Code Sections 9-7-1 through 9-7-16 and Code Section 9-7-21 shall apply to such proceedings. An auditor shall receive compensation for services rendered as may be allowed by the court, to be paid out of the funds of the office of the custodian whose records were lost, mutilated, stolen, or destroyed.

(b) If the court hears the petition, after receiving evidence, the court shall determine whether the purported duplicate is, in fact, the same as the original record which has been lost, mutilated, stolen, or destroyed, and it shall be discretionary with the court to order the whole or any part of such records established. The court shall give precedence to a petition filed pursuant to this article and hear the petition as speedily as possible.

(c) The duplicates which are established pursuant to this Code section, as nearly as may be possible, shall specify and conform to the original book and pages of the same on which they originally existed. (Code 1981, § 24-11-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## PRIVATE PAPERS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-11-20. (Effective January 1, 2013) Establishment of lost office papers.

(a) Upon the loss of any original pleading, declaration, bill of indictment, special presentment, accusation, or other office paper, a duplicate may be established instanter on motion.

(b) As used in this article, the term "office paper" means the instrument upon which a proceeding has been brought after the case has gone to trial. (Code 1981, § 24-11-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-21. (Effective January 1, 2013) Summary establishment of lost or destroyed evidence of indebtedness in probate court — Petition; service of notice; hearing and decision; recordation; appeal to superior court.

(a) The owner, agent of the owner, or legal representative of the owner of any bond, bill, note, draft, check, or other evidence of indebtedness which has been lost or destroyed may establish a duplicate of the same in a summary manner by filing a petition with the judge of the probate court of the county of the residence of the alleged debtor or maker, if he or she is a resident of this state; and the judge of the probate court shall be deemed a judicial officer for the purpose of this Code section. The petition shall be sworn to by the party applying and shall contain as full and accurate a description as possible of the lost paper, of the loss and mode of loss, and of the inability to find the same and why, along with a prayer for the establishment of a duplicate setting forth the duplicate desired to be established.

(b) Upon the filing of a petition, the judge shall issue a citation or notice to the alleged debtor or maker requiring the debtor or maker to appear at a day not more than ten days distant and show cause, if he or she has any, why the duplicate should not be established in lieu of the

lost original. The citation or notice shall be personally served in the manner provided in Code Section 9-11-4 at least five days before the time of the hearing.

(c) If no successful defense is made at the time and place appointed, the judge shall proceed to establish, by an order entered on the petition, the duplicate so prayed to be established, which shall have all the effect of the original. The petition, notice, and order shall be entered in a book of record specially prepared for this purpose.

(d) If the debtor or maker files a defense under oath to the effect that the original never existed as claimed, the judge shall decide the case, after giving the parties time for preparation and hearing, not to exceed 20 days. If the judge's decision is in favor of the applicant and no appeal is entered as provided in subsection (e) of this Code section, the decision shall be entered on the petition, and the duplicate so established shall have the same effect as an original. If the judge's decision is in favor of the alleged debtor or maker, the judge shall also enter his or her decision on the petition. In all cases, the proceedings shall be recorded as provided in subsection (c) of this Code section.

(e) Except as provided in Article 6 of Chapter 9 of Title 15, if either party to the proceedings provided for in this Code section is dissatisfied, such party may appeal upon giving the usual bond and security for costs, as in cases of appeal from the probate court to the superior court. The appeal shall be tried in the superior court from all the pleadings and proceedings as were before the judge of the probate court. In the superior court, the case shall be tried and determined as provided in Code Sections 24-11-23 through 24-11-26.

(f) This Code section shall not apply to evidences of indebtedness to which Title 11, the "Uniform Commercial Code," is applicable. (Code 1981, § 24-11-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-22. (Effective January 1, 2013) Summary establishment of lost or destroyed evidence of indebtedness in probate court — Service of nonresidents; effect.

When the person alleged to be a debtor or maker of a lost or destroyed paper as set forth in Code Section 24-11-21 does not reside in this state, the alleged debtor or maker may be made a party to the proceedings by publication, in a newspaper to be designated by the judge of the probate court, twice a month for two months. When the person has been made a party, this article shall apply in his or her case. (Code 1981, § 24-11-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-23. (Effective January 1, 2013) Establishment of lost or destroyed paper in superior court — Petition and affidavit; issuance and service of rule nisi.

(a) The owner of a lost or destroyed paper which is not an office paper, as defined in Code Section 24-11-20, who desires to establish such paper shall present to the clerk of the superior court of the county where the maker of the paper resides, if the maker is a resident of this state, a petition in writing, together with a duplicate, in substance, of the paper lost or destroyed, as nearly as he or she can recollect, which duplicate shall be sworn to by the petitioner, the petitioner's agent, or the petitioner's attorney.

(b) The clerk shall issue a rule nisi in the name of the judge of the superior court calling upon the opposite party to show cause, if he or she has any, why the duplicate sworn to should not be established in lieu of the lost or destroyed original. If the respondent is found in this state, the rule nisi shall be served personally upon the respondent in the manner provided by Code Section 9-11-4 at least 20 days before the sitting of the court to which the rule nisi is made returnable. If the respondent cannot be found in this state, the rule nisi shall be served upon the respondent by publication in the manner provided in Code Section 9-11-4 before the final hearing of the rule nisi. (Code 1981, § 24-11-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-24. (Effective January 1, 2013) Establishment of lost or destroyed paper in superior court — When continuance granted.

In a proceeding to establish lost papers under Code Section 24-11-23, no continuance shall be granted unless it appears reasonable and just to the court; nor shall a continuance be allowed to the same party more than once, except for providential cause. (Code 1981, § 24-11-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-25. (Effective January 1, 2013) Establishment of lost or destroyed paper.

When a rule nisi has been served as provided in Code Section 24-11-23, the court shall grant a rule absolute establishing the duplicate of the lost or destroyed paper sworn to, unless good and sufficient cause is shown why the rule absolute should not be granted. (Code 1981, § 24-11-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-26. (Effective January 1, 2013) Establishment of lost or destroyed paper — Furnishing of certified endorsement of copy.

When the duplicate of the lost or destroyed paper is established, the clerk of the court in which it is done shall furnish the duplicate to the party who had it established, with a certified endorsement thereon of the day and term of the court when the rule absolute was granted, provided all costs of the proceeding have been paid. (Code 1981, § 24-11-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-27. (Effective January 1, 2013) Procedure as to action on lost or destroyed note, bill, bond, or other instrument.

(a) If the paper which has been lost or destroyed is a note, bill, bond, or other instrument upon which a proceeding may be brought, the owner may institute a proceeding thereon as soon as the rule nisi has been issued as provided for in Code Section 24-11-23. The complaint shall set forth that the paper upon which the proceeding is based is lost or destroyed. In no case shall a judgment be entered in the proceeding until it is determined whether the application to establish the paper is granted or not. If the application is granted, then judgment shall be entered as in other proceedings.

(b) In a proceeding as provided for in subsection (a) of this Code section, production of the paper upon which the proceeding is based shall not be demanded until the time for rendition of judgment in the proceeding; at that time, if the plaintiff produces a duplicate of the paper with a certified endorsement thereon by the clerk of the court in which it was established, as provided in Code Section 24-11-26, it shall be taken and considered as the original.

(c) This Code section shall not apply to instruments to which Title 11, the "Uniform Commercial Code," is applicable. (Code 1981, § 24-11-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-28. (Effective January 1, 2013) Joinder of additional party defendants in proceedings to establish lost or destroyed papers.

In all proceedings for the purpose of establishing any lost or destroyed paper other than an office paper, as defined in Code Section 24-11-20, any person whose interest will be affected by the establishment of the lost paper shall, upon motion, by order of the court, be made a party respondent in the proceeding and shall be allowed all the rights of defense against the establishment of the paper as fully as if he or she was the maker of the lost paper. (Code 1981, § 24-11-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-11-29. (Effective January 1, 2013) Applicability of article.

Other than Code Section 24-11-20, this article shall not apply to lost or destroyed papers to which Title 11, the "Uniform Commercial Code," is applicable. (Code 1981, § 24-11-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

# CHAPTER 12

# MEDICAL AND OTHER CONFIDENTIAL INFORMATION

**Article 1**

**Release of Medical Information and Confidentiality of Raw Research Data**

Sec.



**Article 2**

**Confidentiality of Medical Information**



**Article 3**

**AIDS Information**



**Article 4**

**Other Confidential Information**



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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 1

## RELEASE OF MEDICAL INFORMATION AND CONFIDENTIALITY OF RAW RESEARCH DATA

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

**24-12-1. (Effective January 1, 2013) When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.**

(a) No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of this state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Community Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to Code Section 31-12-2 and where authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

(b) No pharmacist licensed under Chapter 4 of Title 26 shall be required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. (Code 1981, § 24-12-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

**24-12-2. (Effective January 1, 2013) Confidentiality of raw research data.**

(a) The General Assembly finds and declares that protecting the confidentiality of research data from disclosure in judicial and administrative proceedings is essential to safeguarding the integrity of research in this state, guaranteeing the privacy of individuals who participate in research projects, and ensuring the continuation of research in science, medicine, and other fields that benefits the citizens and institutions of Georgia and other states. The protection of such research data has more than local significance, is of equal importance to all citizens of this state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of this state.

(b) As used in this Code section, the term "confidential raw research data" means medical information, interview responses, reports, statements, memoranda, or other data relating to the condition, treatment, or characteristics of any person which are gathered by or provided to a researcher:

(1) In support of a research study approved by an appropriate research oversight committee of a hospital, health care facility, or educational institution; and

(2) With the objective to develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.

The term shall not include published compilations of the raw research data created by the researcher or the researcher's published summaries, findings, analyses, or conclusions related to the research study.

(c) Confidential raw research data in a researcher's possession shall not be subject to subpoena, otherwise discoverable, or deemed admissible as evidence in any judicial or administrative proceeding in any court except as otherwise provided in subsection (d) of this Code section.

(d) Confidential raw research data may be released, disclosed, subject to subpoena, otherwise discoverable, or deemed admissible as evidence in a judicial or administrative proceeding as follows:

(1) Confidential raw research data related to a person may be disclosed to that person or to another person on such person's behalf where the authority is otherwise specifically provided by law;

(2) Confidential raw research data related to a person may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the research participant or where a designation is made in writing by a person authorized by law to act for the participant;

(3) Confidential raw research data related to a person may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if such data are required by law or regulation to be reported to such agency or department;

(4) Confidential raw research data may be disclosed in any proceeding in which a party was a participant, researcher, or sponsor in the underlying research study, including, but not limited to, any judicial or administrative proceeding in which a research participant places his or her care, treatment, injuries, insurance coverage, or benefit plan coverage at issue; provided, however, that the identity of any research participant other than the party to the judicial or administrative proceeding shall not be disclosed, unless the researcher or sponsor is a defendant in such proceeding;

(5) Confidential raw research data may be disclosed in any judicial or administrative proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties to such proceeding; and

(6) In a criminal proceeding, the court shall order the production of confidential raw research data if the data are relevant to any issue in the proceeding, impose appropriate safeguards against unauthorized disclosure of the data, and admit confidential raw research data into evidence if the data are material to the defense or prosecution.

(e) Nothing in this Code section shall be construed to permit, require, or prohibit the disclosure of confidential raw research data in any setting other than a judicial or administrative proceeding that is governed by the requirements of this title.

(f) Any disclosure of confidential raw research data authorized or required by this Code section or any other law shall in no way destroy the confidential nature of that data except for the purpose for which the authorized or required disclosure is made. (Code 1981, § 24-12-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## CONFIDENTIALITY OF MEDICAL INFORMATION

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

**24-12-10. (Effective January 1, 2013) Definitions.**

As used in this article, the term:

(1) "Confidential or privileged" means the protection afforded by law from unauthorized disclosure, whether the protection is afforded by law as developed and applied by the courts, by statute or lawful regulations, or by the requirements of the Constitutions of the State of Georgia or the United States. The term "confidential or privileged" also includes protection afforded by law from compulsory process or testimony.

(2) "Disclosure" means the act of transmitting or communicating medical matter to a person who would not otherwise have access thereto.

(3) "Health care facility" means any institution or place in which health care is rendered to persons, which health care includes, but is not limited to, medical, psychiatric, acute, intermediate, rehabilitative, and long-term care.

(4) "Laws requiring disclosure" means laws and statutes of the State of Georgia and of the United States and lawful regulations issued by any department or agency of the State of Georgia or of the United States which require the review, analysis, or use of medical matter by persons not originally having authorized access thereto. The term "laws requiring disclosure" also includes any authorized practice of disclosure for purposes of evaluating claims for reimbursement for charges or expenses under any public or private reimbursement or insurance program.

(5) "Limited consent to disclosure" means proper authorization given by or on behalf of a person entitled to protection from disclosure of medical matter and given for a specific purpose related to such person's health or related to such person's application for insurance or like benefits.

(6) "Medical matter" means information respecting the medical or psychiatric condition, including without limitation the physical and the mental condition, of a natural person or persons, however recorded, obtained, or communicated.

(7) "Nurse" means a person authorized by license issued under Chapter 26 of Title 43 as a registered professional nurse or licensed practical nurse to practice nursing.

(8) "Physician" means any person lawfully licensed in this state to practice medicine and surgery pursuant to Chapter 34 of Title 43. (Code 1981, § 24-12-10, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-12-11. (Effective January 1, 2013) Disclosure of medical records — Effect on confidential or privileged character thereof.

The disclosure of confidential or privileged medical matter constituting all or part of a record kept by a health care facility, a nurse, or a physician, pursuant to laws requiring disclosure or pursuant to limited consent to disclosure, shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made. (Code 1981, § 24-12-11, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-12-12. (Effective January 1, 2013) Disclosure of medical records — Use of medical matter disclosed.

Persons to whom confidential or privileged medical matter is disclosed in the circumstances described in Code Section 24-12-11 shall utilize such matter only in connection with the purpose or purposes of such disclosure and thereafter shall keep such matter in confidence. However, nothing in this article shall prohibit the use of such matter where otherwise authorized by law. (Code 1981, § 24-12-12, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-12-13. (Effective January 1, 2013) Disclosure of medical records — Immunity from liability.

Any person, corporation, authority, or other legal entity acting in good faith shall be immune from liability for the transmission, receipt, or use of medical matter disclosed pursuant to laws requiring disclosure or pursuant to limited consent to disclosure. (Code 1981, § 24-12-13, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-12-14. (Effective January 1, 2013) Disclosure of medical records — Use for educational purposes not precluded.

Nothing in this article shall be construed to prevent the customary and usual audit, discussion, and presentation of cases in connection with medical and public education. (Code 1981, § 24-12-14, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 3

## AIDS INFORMATION

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-12-20. (Effective January 1, 2013) Confidential nature of AIDS information.

AIDS confidential information as defined in Code Section 31-22-9.1 and disclosed or discovered within the patient-physician relationship shall be confidential and shall not be disclosed except as otherwise provided in Code Section 24-12-21. (Code 1981, § 24-12-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-12-21. (Effective January 1, 2013) Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information shall be disclosed to the person identified by that information or, if that person is a minor or incompetent person, to that person's parent or legal guardian.

(d) AIDS confidential information shall be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information shall be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test shall be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Community Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Community Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Community Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Community Health.

(3) The Department of Community Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Community Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the Department of Community Health likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if

that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee shall be authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees shall only be authorized when reasonably

necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

(q) A public safety agency or prosecuting attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-66.1, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information shall be disclosed as medical information pursuant to Code Section 24-12-1 or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure; or

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the

privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil proceeding; or

(C) A public safety agency or the Department of Community Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and, for purposes of this subsection, the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with

notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Community Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which specifically refers to "AIDS confidential information," "HIV test results," or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient's health care provider directly or indirectly under the provisions of subsection (i) of this Code

section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Community Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-12-20 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his or her heirs, successors, assigns, or a beneficiary of such person, including, but not limited to, an executor, administrator, or personal representative of such person's estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person's care and treatment, the nature and extent of his or her injuries, the extent of his or her damages, his or her medical condition, or the reasons for his or her death at issue in any judicial proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33.

(aa) In connection with any judicial proceeding in which AIDS confidential information is disclosed as authorized or required by this Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including, but not limited to, testifying regarding any notifications to the patient regarding results of an

HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Community Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, developmentally disabled, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for

permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or procedures, provided that the identity of the person identified by such information is not thereby revealed. (Code 1981, § 24-12-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**The 2012 amendment,** effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, deleted "as" following "shall apply" in the second sentence of subsection (aa).

## ARTICLE 4

## OTHER CONFIDENTIAL INFORMATION

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-12-30. (Effective January 1, 2013) Confidential nature of certain library records.

(a) Circulation and similar records of a library which identify the user of library materials shall not be public records but shall be confidential and shall not be disclosed except:

(1) To members of the library staff in the ordinary course of business;

(2) Upon written consent of the user of the library materials or the user's parents or guardian if the user is a minor or ward; or

(3) Upon appropriate court order or subpoena.

(b) Any disclosure authorized by subsection (a) of this Code section or any unauthorized disclosure of materials made confidential by subsection (a) of this Code section shall not in any way destroy the confidential nature of that material, except for the purpose for which an authorized disclosure is made. A person disclosing material as authorized by subsection (a) of this Code section shall not be liable therefor. (Code 1981, § 24-12-30, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-12-31. (Effective January 1, 2013) Confidential nature of veterinarian records.

No veterinarian licensed under Chapter 50 of Title 43 shall be required to disclose any information concerning the veterinarian's care of an animal except on written authorization or other waiver by the veterinarian's client or on appropriate court order or subpoena. Any veterinarian releasing information under written authorization or other waiver by the client or under court order or subpoena shall not be liable to the client or any other person. The confidentiality provided by

this Code section shall be waived to the extent that the veterinarian's client places the veterinarian's care and treatment of the animal or the nature and extent of injuries to the animal at issue in any judicial proceeding. As used in this Code section, the term "client" means the owner of the animal; or if the owner of the animal is unknown, client means the person who presents the animal to the veterinarian for care and treatment. (Code 1981, § 24-12-31, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

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# CHAPTER 13

# SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE

## Article 1

## General Provisions

Sec.



## Article 2

## Subpoenas and Notice to Produce

Sec.

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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

# ARTICLE 1

# GENERAL PROVISIONS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

## 24-13-1. (Effective January 1, 2013) Freedom of witnesses from arrest.

A witness shall not be arrested on any civil process while attending any court to which he or she is subpoenaed or otherwise required to attend as a witness or while going to or returning from such court. An officer who holds such witness imprisoned after seeing his or her subpoena or being satisfied of the fact that such person was a witness shall be liable for false imprisonment. (Code 1981, § 24-13-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-13-2. (Effective January 1, 2013) Procedure for claiming witness fees.

A witness in making a claim or proof of a claim for witness fees for attendance shall indicate the date on which he or she attended and, in the event of a continuance, shall not claim or receive witness fees for any day after the date to which the docket shows the proceeding was continued nor for any day before the continuance was granted on which he or she did not attend. (Code 1981, § 24-13-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-3. (Effective January 1, 2013) Witness fee exceptions.

(a) A witness shall not receive any witness fees for attendance on a subpoena if such witness is absent from the proceeding, or if the proceeding is continued at any time due to his or her absence, where such absence did not arise from providential cause.

(b) No witness shall receive witness fees from both parties in the same proceeding; the fees of a witness for both parties shall be apportioned equally between the parties unless the costs are all taxed against one party. (Code 1981, § 24-13-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-4. (Effective January 1, 2013) Penalty for excessive witness fee claim.

A witness who claims more than is due to such witness shall forfeit all witness fees and shall pay to the injured party, in addition thereto, four times the amount so unjustly claimed. (Code 1981, § 24-13-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-5. (Effective January 1, 2013) Production of evidence when item not available; oath.

When any person is served with a subpoena for the production of evidence or a notice to produce, seeking books in his or her possession

to be used as testimony on the trial of any cause, if the person makes oath that he or she cannot produce the books required without suffering a material injury in his or her business and also makes or causes to be made out a full transcript from the books of all the accounts and dealings with the opposite party, has the transcript examined and sworn to by an impartial witness, and produces the same in court, the witness shall be deemed to have complied with the notice to produce or subpoena for the production of evidence. (Code 1981, § 24-13-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-6. (Effective January 1, 2013) Procedure when adverse party dissatisfied with response pursuant to Code Section 24-13-5.

When the transcript provided for in Code Section 24-13-5 is produced in court, if the adverse party is dissatisfied therewith and swears that he or she believes that the books contain entries material to the adverse party which do not appear in the transcript, the court shall grant him or her a commission directed to certain persons named by the parties and approved by the court. The commission shall cause the person with possession of the books to produce the books required with the person swearing that the books produced are all that he or she has or had that answer to the description in the subpoena or notice to produce. The commission shall examine the books and transmit to the court a full and fair statement of the accounts and entries between the parties under their hand. When received by the court, the statement of the commission shall be deemed a compliance with the notice to produce or subpoena for the production of evidence. (Code 1981, § 24-13-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-7. (Effective January 1, 2013) Withdrawal of originals introduced in evidence; substitution of copies; discretion of court.

Parties interested and participating in the trial of all cases tried in the courts are authorized and empowered, on the order of the court trying the case, to withdraw from the court and record of the case all original deeds, maps, blueprints, notes, papers, and documents belonging to the parties and which are introduced in evidence on the trial, on substituting therefor, when required by the court, duplicates thereof,

verified as such by the parties or their agents, representatives, or attorneys. However, if any such deeds, maps, blueprints, notes, papers, or documents shall be attacked by any party to the case as forgeries, or as not being genuine originals, it shall be in the discretion of the court to require the original deeds, maps, blueprints, notes, papers, or documents so attacked to remain on file in the court as a part of the record in the case. (Code 1981, § 24-13-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## SUBPOENAS AND NOTICE TO PRODUCE

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-13-20. (Effective January 1, 2013) Applicability.

This article shall apply to all civil proceedings and, insofar as consistent with the Constitution, to all criminal proceedings. (Code 1981, § 24-13-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-21. (Effective January 1, 2013) Subpoena for attendance of witnesses — Form; issuance; subpoena in blank.

(a) As used in this Code section, the term "subpoena" includes a witness subpoena and a subpoena for the production of evidence.

(b) A subpoena shall state the name of the court, the name of the clerk, and the title of the proceeding and shall command each person to whom it is directed to attend and give testimony or produce evidence at a time and place specified by the subpoena.

(c) The clerk of court shall make subpoenas in blank available on demand by electronic or other means to parties or their counsel or to the grand jury.

(d) An attorney who is counsel of record in a proceeding may issue and sign a subpoena obtained by electronic or other means from the clerk of court as an officer of a court for any deposition, hearing, or trial held in conjunction with such proceeding.

(e) A district attorney may issue, and upon the request of the grand jury shall issue, a subpoena in grand jury proceedings.

(f) A subpoena shall be completed prior to being served.

(g) Subpoenas are enforceable as provided in Code Section 24-13-26.

(h) If an individual misuses a subpoena, he or she shall be subject to punishment for contempt of court and shall be punished by a fine of not more than $300.00 or not more than 20 days' imprisonment, or both. (Code 1981, § 24-13-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**The 2012 amendment,** effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (h).

### 24-13-22. (Effective January 1, 2013) Subpoena for attendance of witnesses — Attendance at hearing or trial; where served.

At the request of any party, subpoenas for attendance at a hearing or trial shall be issued under the authority of the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within this state. (Code 1981, § 24-13-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-23. (Effective January 1, 2013) Subpoena for production of documentary evidence; motion to quash or modify.

(a) A subpoena may also command the person to whom it is directed to produce the evidence designated therein.

(b) The court, upon written motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the evidence. (Code 1981, § 24-13-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-24. (Effective January 1, 2013) Service of subpoenas.

A subpoena may be served by any sheriff, by his or her deputy, or by any other person not less than 18 years of age. Proof may be shown by return or certificate endorsed on a copy of the subpoena. Subpoenas may also be served by registered or certified mail or statutory overnight delivery, and the return receipt shall constitute prima-facie proof of service. Service upon a party may be made by serving his or her counsel of record. (Code 1981, § 24-13-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-25. (Effective January 1, 2013) Fees and mileage; when tender required.

Except as provided in Code Section 24-13-28, the witness fee shall be $25.00 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of witness fees shall not be demanded as a condition precedent to attendance; but, when a witness resides outside the county where the testimony is to be given, service of the subpoena, to be valid, shall be accompanied by tender of the witness fee for one day's attendance plus mileage of 45¢ per mile for traveling expenses for going from and returning to his or her place of residence by the nearest practical route. Tender of witness fees and mileage may be made by United States currency, postal money order, cashier's check, certified check, or the check of an attorney or law firm. When the subpoena is issued on behalf of this state, or an officer, agency, or political subdivision thereof, or an accused in a criminal proceeding, witness fees and mileage need not be tendered. (Code 1981, § 24-13-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-26. (Effective January 1, 2013) Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

(a) Subpoenas may be enforced by attachment for contempt and by a fine of not more than $300.00 or not more than 20 days' imprisonment, or both. In all proceedings under this Code section, the court shall consider whether under the circumstances of each proceeding the subpoena was served within a reasonable time, but in any event not less than 24 hours prior to the time that appearance thereunder was required.

(b) The court may also in appropriate proceedings grant continuance of the proceeding. Where subpoenas were issued in blank, no continuance shall be granted because of failure to respond thereto when the party obtaining such subpoenas fails to present to the clerk the name and address of the witness so subpoenaed at least six hours before appearance is required.

(c) When evidence is unsuccessfully sought, secondary evidence thereof shall be admissible. (Code 1981, § 24-13-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**The 2012 amendment,** effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in the first sentence of subsection (a).

### 24-13-27. (Effective January 1, 2013) Notice to produce.

Where a party desires to compel production of evidence in the possession, custody, or control of another party, in lieu of serving a subpoena under this article, the party desiring the production may serve a notice to produce upon counsel for the other party. Service may be perfected in accordance with Code Section 24-13-24, but no witness fees or mileage shall be allowed therefor. Such notices may be enforced in the manner prescribed by Code Section 24-13-26, and Code Section 24-13-23 shall also apply to such notices. The notice shall be in writing, signed by the party seeking production of the evidence, or the party's attorney, and shall be directed to the opposite party or his or her attorney. (Code 1981, § 24-13-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**24-13-28. (Effective January 1, 2013) Witness fees for law enforcement officers.**

(a) As used in this Code section, the term:

(1) "Director" means the appropriate chief of police, sheriff, director of public safety of a college or university, local fire chief, director of the Georgia Bureau of Investigation, the commanding officer of the Georgia State Patrol, the commissioner of natural resources, the superintendent of a correctional institution, or the state fire marshal.

(2) "Law enforcement officer" means any member of a municipal or county police force, any deputy sheriff, any campus policeman as defined in Code Section 20-8-1, any member of a local fire department, any member of the Georgia State Patrol or Georgia Bureau of Investigation, any correctional officer, any person employed by the Department of Natural Resources as a law enforcement officer, or any arson investigator of the state fire marshal's office.

(3) "Regular duty hours" means the daily shift of duty to which a law enforcement officer is assigned and shall not include paid or unpaid vacation, paid or unpaid sick leave, paid or unpaid holiday leave, or any other paid or unpaid leave status established pursuant to the personnel regulations or scheduling practices of the employing agency.

(b) Any law enforcement officer who shall be required by subpoena to attend any superior court, other courts having jurisdiction to enforce the penal laws of this state, municipal court having jurisdiction to enforce the penal laws of this state as provided by Code Section 40-13-21, juvenile court, grand jury, hearing or inquest held or called by a coroner, or magistrate court involving any criminal matter, as a witness on behalf of the state during any hours except the regular duty hours to which the officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than $25.00 per diem. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify this statement. The dates of attendance shall be certified by the judge or the prosecuting attorney of the court attended. The director or his or her designee shall certify that the claimant has not received any overtime pay for his or her attendance and that his or her attendance was required during hours other than regular duty hours. The amount due shall be paid by the governing body authorized to dispense public funds for the operation of the court. However, no such law enforcement officer shall claim or receive more than one witness fee per day for attendance in any court or before the grand jury regardless of the

number of subpoenas which the law enforcement officer may have received requiring such officer to appear in such court or before the grand jury on any one day.

(c)(1) Except as provided in paragraph (2) of this subsection, any law enforcement officer who shall be required by subpoena to attend any court of this state with respect to any civil proceeding, as a witness concerning any matter relative to the law enforcement duties of such law enforcement officer during any hours except the regular duty hours to which the law enforcement officer is assigned, shall be paid for such attendance at a fixed rate to be established by the governing authority, but not less than $25.00 per diem. Any such law enforcement officer shall also be entitled to the mileage allowance provided in Code Section 24-13-25 when such law enforcement officer resides outside the county where the testimony is to be given. The claim for the witness fees shall be endorsed on the subpoena showing the dates of attendance and stating that attendance was required during the hours other than the regular duty hours to which the claimant was assigned. The claimant shall verify such statement. The dates of attendance shall be certified by the party obtaining the subpoena. The director or his or her designee shall certify that the claimant has not received any overtime pay for the law enforcement officer's attendance and that such law enforcement officer's attendance was required during hours other than regular duty hours.

(2) Any law enforcement officer covered by paragraph (1) of this subsection who is required by subpoena to attend any court with respect to any civil proceeding, as a witness concerning any matter which is not related to the duties of such law enforcement officer, shall be compensated as provided in Code Section 24-13-25.

(d) The fee specified by subsections (b) and (c) of this Code section shall not be paid if the law enforcement officer receives any overtime pay for time spent attending such court pursuant to the subpoena. (Code 1981, § 24-13-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-29. (Effective January 1, 2013) Legislators' exemption.

No member of the General Assembly of Georgia shall be compelled to attend and give testimony at any hearing or trial or to produce evidence while the General Assembly is in regular or extraordinary session. (Code 1981, § 24-13-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 3

## SECURING ATTENDANCE OF PRISONERS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-13-60. (Effective January 1, 2013) Order requiring prisoner's delivery to serve as witness or criminal defendant generally; expenses; prisoner under death sentence as witness.

(a) When a prisoner confined in any state prison, county correctional institution, or other penal institution under the jurisdiction of the Board of Corrections, other than a prisoner under a death sentence, is needed as a witness in any judicial proceeding in any court of record in this state or when it is desired that such person stand trial on an indictment or accusation charging the prisoner with commission of a felony or misdemeanor, the judge of the court wherein the proceeding is pending shall be authorized to and shall issue an ex parte order, directed to the commissioner of corrections, requiring the prisoner's delivery to the sheriff of the county where the prisoner is desired as a witness or accused. The sheriff or his or her deputies shall take custody of the prisoner on the date named in the order, safely keep the prisoner pending the proceeding, and return him or her to the original place of detention after the prisoner's discharge by the trial judge.

(b) If the prisoner was desired as a witness by this state in a criminal proceeding or if the prisoner's release to the sheriff was for the purpose of standing trial on criminal charges, the county wherein the proceeding was pending shall pay all expenses of transportation and keeping, including per diem and mileage of the sheriff, jail fees, and any other proper expense approved by the trial judge.

(c) If the prisoner was desired as a witness by the accused in a criminal proceeding or by either party to a civil proceeding, the costs and expenses referred to in subsection (b) of this Code section shall be borne by the party requesting the prisoner as a witness. The court shall require a deposit of money sufficient to defray same, except where the judge, after examining into the matter, determines that the prisoner's presence is required by the interests of justice and that the party requesting it is financially unable to make the deposit, in which case the expenses shall be taxed as costs of court.

(d) If a prisoner under a death sentence is needed as a witness for either the prosecution or the defense in any felony case, the requesting party may interview the proposed witness. Following such interview, the requesting party may move for a writ of habeas corpus ad testificandum. Such motion shall be accompanied by a proffer of the testimony of the proposed witness. The requesting party shall make such motion and proffer as soon as possible but shall not make such motion later than 20 days prior to the date of the trial. Nothing in this Code section shall limit the right of a party from presenting a material witness at a hearing or trial and to have compulsory process for that purpose. (Code 1981, § 24-13-60, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-61. (Effective January 1, 2013) Issuance of order requiring prisoner's delivery to serve as witness in superior court.

Any judge of the superior court may issue an order to any officer having a lawfully imprisoned person in his or her custody, requiring the production of such person before the court for the purpose of giving evidence in any criminal cause pending therein, without any formal application or writ of habeas corpus ad testificandum for that purpose. (Code 1981, § 24-13-61, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-62. (Effective January 1, 2013) Issuance of writ of habeas corpus requiring prisoner's delivery to serve as witness in superior court.

The writ of habeas corpus ad testificandum may be issued by the superior court to cause the production in court of any witness under legal imprisonment. (Code 1981, § 24-13-62, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 4

## UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-13-90. (Effective January 1, 2013) Short title.

This article shall be known and may be cited as "The Uniform Act to Secure the Attendance of Witnesses from Without the State." (Code 1981, § 24-13-90, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-91. (Effective January 1, 2013) Definitions.

As used in this article, the term:

(1) "Penal institution" means a jail, prison, penitentiary, house of correction, or other place of penal detention.

(2) "State" means any state or territory of the United States and the District of Columbia.

(3) "Summons" means a subpoena, order, or other notice requiring the appearance of a witness.

(4) "Witness" means a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal prosecution or proceeding held by the prosecution or the defense, including a person who is confined in a penal institution in any state. (Code 1981, § 24-13-91, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-92. (Effective January 1, 2013) Criminal or grand jury proceeding in foreign state — Certificate of need for testimony; expenses; punishment.

(a) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person

within this state is a material witness in such prosecution or grand jury investigation, and that the witness's presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which the person is found, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing. The witness shall at all times be entitled to counsel.

(b) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence will give to such witness protection from arrest and the service of civil and criminal process, the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing, the certificate shall be prima-facie evidence of all the facts stated therein.

(c) If such certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the witness's attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that the witness be forthwith brought before him or her for the hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima-facie proof of such desirability, may, in lieu of issuing a subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.

(d) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 45¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and $25.00 for each day that the witness is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for in Code Section 24-13-26. (Code 1981, § 24-13-92, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**The 2012 amendment,** effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised language in subsection (c).

**24-13-93. (Effective January 1, 2013) Criminal or grand jury proceeding in foreign state — Certificate of need for prisoner's testimony; order by judge in requesting state; applicability.**

(a) A judge of a state court of record in another state which by its laws has made provision for commanding persons confined in penal institutions within that state to attend and testify in this state may certify that there is a criminal proceeding or investigation by a grand jury or a criminal proceeding pending in the court, that a person who is confined in a penal institution in this state is a material witness in the proceeding or investigation, and that the witness's presence will be required during a specified time. Upon presentation of the certificate to any judge having jurisdiction over the person confined and upon notice to the Attorney General, the judge in this state shall fix a time and place for a hearing and shall make an order directed to the person having custody of the prisoner requiring that the prisoner be produced before him or her at the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that the witness attending and testifying are not adverse to the interest of this state or to the health and legal rights of the witness, that the laws of the state in which the witness is required to testify will give the witness protection from arrest and the service of civil and criminal process because of any act committed prior to the witness's arrival in the state under the order, and that as a practical matter the possibility is negligible that the witness may be subject to arrest or to the service of civil or criminal process in any state through which the witness will be required to pass, the judge shall issue an order, with a copy of the certificate attached, directing the witness to attend and testify, directing the person having custody of the witness to produce the witness in the court where the criminal proceeding is pending or where the grand jury investigation is pending at a time and place specified in the order, and prescribing such conditions as the judge shall determine. The judge, in lieu of directing the person having custody of the witness to produce the witness in the requesting jurisdiction's court, may direct and require in the court's order that the requesting jurisdiction shall come to the Georgia penal institution in which the witness is confined to accept custody of the witness for physical transfer to the requesting jurisdiction; that the requesting jurisdiction shall provide proper safeguards on the witness's custody while in transit; that the requesting jurisdiction shall be liable for and shall pay all expenses incurred in producing and returning the witness, including, but not limited to, food, lodging, clothing, and medical care; and that the requesting jurisdiction shall promptly deliver the witness back to the same or another Georgia penal institution as specified by the Department of Corrections at the conclusion of his or her testimony.

(c) The order to the witness and to the person having custody of the witness shall provide for the return of the witness at the conclusion of his or her testimony, proper safeguards on his or her custody, and proper financial reimbursement or prepayment by the requesting jurisdiction of all expenses incurred in the production and return of the witness and may prescribe such other conditions as the judge thinks proper or necessary. If the judge directs and requires the requesting jurisdiction to accept custody of the witness at the Georgia penal institution in which the witness is confined and to deliver the witness back to the same or another Georgia penal institution at the conclusion of the witness's testimony, no prepayment of expenses shall be necessary. The order shall not become effective until the judge of the state requesting the witness enters an order directing compliance with the conditions prescribed.

(d) This Code section shall not apply to any person in this state confined as insane or mentally ill or under sentence of death. (Code 1981, § 24-13-93, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-94. (Effective January 1, 2013) Criminal or grand jury proceeding in this state — Issuance of certificate; how long witness detained; punishment.

(a) If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation which has commenced or is about to commence a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in this state, the witness shall be tendered the sum of 45¢ a mile for each mile by the ordinarily traveled route to and from the court where the prosecution is pending and $25.00 for each day that the witness is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state for a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness,

after coming into this state, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for in Code Section 24-13-26. (Code 1981, § 24-13-94, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-95. (Effective January 1, 2013) Criminal or grand jury proceeding in this state — Issuance of certificate seeking testimony of prisoner; notice to attorney general; order of compliance.

(a) If a person confined in a penal institution in any other state is a material witness in a criminal proceeding pending in a court of record or in a grand jury investigation in this state, a judge of the court may certify that there is a criminal proceeding or investigation by a grand jury or a criminal proceeding pending in the court, that a person who is confined in a penal institution in the other state is a material witness in the proceeding or investigation, and that the witness's presence will be required during a specified time. The certificate shall be presented to a judge of a court of record in the other state having jurisdiction over the confined prisoner, and a notice shall be given to the attorney general of the state in which the prisoner is confined.

(b) The judge of the court in this state may enter an order directing compliance with the terms and conditions prescribed by the judge of the state in which the witness is confined. (Code 1981, § 24-13-95, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-96. (Effective January 1, 2013) Exemption of witnesses from arrest and service of process.

(a) If a person comes into this state in obedience to a summons directing him or her to attend and testify in this state, such person shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before such person's entrance into this state under the summons.

(b) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he or she shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in

connection with matters which arose before such person's entrance into this state under the summons. (Code 1981, § 24-13-96, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-97. (Effective January 1, 2013) Construction.

This article shall be interpreted and construed so as to effectuate its general purpose to make uniform the laws of the states which enact it and shall be applicable only to such states as shall enact reciprocal powers to this state relative to the matter of securing attendance of witnesses as provided in this article. (Code 1981, § 24-13-97, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 5

## UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

**Effective date.** — This article becomes effective January 1, 2013. See editor's note for applicability.

**Editor's notes.** — Ga. L. 2012, p. 651, § 2-1/HB 46, effective January 1, 2013, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 24-13-110 through 24-13-112, relating to the Uniform Foreign Depositions Act, and was based on Code 1981, §§ 24-13-110—24-13-112, enacted by Ga. L. 2011, p. 99, § 2/HB 24.

Ga. L. 2012, p. 651, § 3-1(b)(1)/HB 46, not codified by the General Assembly, provides, in part, that this article shall apply to subpoenas served on or after July 1, 2013, and in actions pending on or after July 1, 2013.

### 24-13-110. (Effective January 1, 2013) Short title.

This article shall be known and may be cited as the "Uniform Interstate Depositions and Discovery Act." (Code 1981, § 24-13-110, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-111. (Effective January 1, 2013) Definitions.

As used in this article, the term:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Native American tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) Attend and give testimony at a deposition;

(B) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of such person; or

(C) Permit inspection of premises under the control of such person. (Code 1981, § 24-13-111, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-112. (Effective January 1, 2013) Requirements for issuance of foreign subpoenas; application.

(a) To request issuance of a subpoena under this Code section, a party shall submit a foreign subpoena to the clerk of superior court of the county in which the person receiving the subpoena resides. A request for the issuance of a subpoena under this Code section shall not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of superior court in this state, the clerk shall promptly issue and provide to the requestor a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) of this Code section shall:

(1) Incorporate the terms used in the foreign subpoena; and

(2) Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(d) This Code section shall only apply to a subpoena to be issued in this state if the foreign jurisdiction that issued the foreign subpoena has adopted a version of the "Uniform Interstate Depositions and Discovery Act."

(e) This Code section shall not apply to criminal proceedings. (Code 1981, § 24-13-112, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-113. (Effective January 1, 2013) Compelling foreign witness to appear and testify.

(a) For purposes of this Code section, the term "subpoena" shall have only the meaning set forth in subparagraph (A) of paragraph (5) of Code Section 24-13-111.

(b) In addition to the mechanism for issuing subpoenas provided for in Code Section 24-13-112, whenever any mandate, writ, or commission is issued out of any court of record in a foreign jurisdiction, a witness may be compelled by subpoena issued by the clerk of superior court of the county in which such witness resides to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state. (Code 1981, § 24-13-113, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-114. (Effective January 1, 2013) Service of foreign subpoena.

A subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall be served in compliance with Code Section 24-13-23 and shall be served within a reasonable time prior to the appearance required by such subpoena. (Code 1981, § 24-13-114, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-115. (Effective January 1, 2013) Applicability of Article 2 to certain provisions of this article.

Article 2 of this chapter shall apply to subpoenas issued under Code Section 24-13-112 or 24-13-113. (Code 1981, § 24-13-115, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-116. (Effective January 1, 2013) Protective order or enforcement, quashing, or modification of foreign subpoena.

An application for a protective order or to enforce, quash, or modify a subpoena issued by the clerk of superior court under Code Section 24-13-112 or 24-13-113 shall comply with the statutes and court rules of this state and shall be submitted to the superior court of the county in which the subpoena was issued. (Code 1981, § 24-13-116, enacted by Ga. L. 2012, p. 651, § 2-1/HB 46.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 6

## DEPOSITIONS TO PRESERVE TESTIMONY IN CRIMINAL PROCEEDINGS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-13-130. (Effective January 1, 2013) When deposition to preserve testimony in criminal proceedings may be taken.

(a)(1) At any time after an accused has been charged with an offense against the laws of this state or an ordinance of any political subdivision or authority thereof, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of a prospective material witness of a party be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

(2) At any time after an accused has been charged with an offense of child molestation, aggravated child molestation, or physical or sexual abuse of a child, upon motion of the state or the accused, the court having jurisdiction to try the offense charged may, after notice to the parties, order that the testimony of any physician whose testimony is relevant to such charge be taken by deposition and that any designated evidence not privileged be produced at the same time and place.

(b) The court shall not order the taking of the witness's testimony, except as provided in paragraph (2) of subsection (a) of this Code section, unless it appears to the satisfaction of the court that the testimony of the witness is material to the proceeding and the witness:

(1) Is in imminent danger of death;

(2) Has been threatened with death or great bodily harm because of the witness's status as a potential witness in a criminal trial or proceeding;

(3) Is about to leave this state and there are reasonable grounds to believe that such witness will be unable to attend the trial;

(4) Is so sick or infirm as to afford reasonable grounds to believe that such witness will be unable to attend the trial; or

(5) Is being detained as a material witness and there are reasonable grounds to believe that the witness will flee if released from detention.

(c) A motion to take a deposition of a material witness, or a physician as provided in paragraph (2) of subsection (a) of this Code section, shall be verified and shall state:

(1) The nature of the offense charged;

(2) The status of the criminal proceedings;

(3) The name of the witness and an address in Georgia where the witness may be contacted;

(4) That the testimony of the witness is material to the proceeding or that the witness is a physician as provided in paragraph (2) of subsection (a) of this Code section; and

(5) The basis for taking the deposition as provided in subsection (b) of this Code section.

(d) A motion to take a deposition shall be filed in the court having jurisdiction to try the accused for the offense charged; provided, however, that if the accused is charged with multiple offenses, only the court having jurisdiction to try the most serious charge against the

accused shall have jurisdiction to hear and decide the motion to take a deposition.

(e) The party moving the court for an order pursuant to this Code section shall give not less than one day's notice of the hearing to the opposite party. A copy of the motion shall be sent to the opposing party or his or her counsel by any means which will reasonably ensure timely delivery, including transmission by facsimile or by digital or electronic means. A copy of the notice shall be attached to the motion and filed with the clerk of court.

(f) If the court is satisfied that the examination of the witness is authorized by law and necessary, the court shall enter an order setting a time period of not more than 30 days during which the deposition shall be taken.

(g) On motion of either party, the court may designate a judge who shall be available to rule on any objections to the interrogation of the witness or before whom the deposition shall be taken. The judge so designated may be a judge of any court of this state who is otherwise qualified to preside over the trial of criminal proceedings in the court having jurisdiction over the offense charged. (Code 1981, § 24-13-130, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-131. (Effective January 1, 2013) Notice of deposition; presence of defendant at examination; child witness.

(a) The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined.

(b) On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

(c) The officer having custody of an accused shall be notified of the time and place set for the examination and shall, unless the accused waives in writing the right to be present, produce the accused at the examination and keep the accused in the presence of the witness during the examination unless, after being warned by the judge that disruptive conduct will cause the accused's removal from the place where the deposition is being taken, the accused persists in conduct which would justify exclusion from that place.

(d) An accused not in custody shall have the right to be present at the examination; but failure of the accused to appear, absent good cause

shown, after notice and tender of expenses, shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(e) Notwithstanding the provisions of subsections (c) and (d) of this Code section, if the witness is a child, the court may order that the deposition be taken in accordance with Code Section 17-8-55. (Code 1981, § 24-13-131, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-132. (Effective January 1, 2013) Appointment of counsel; payment of costs and expenses.

(a) If an accused is financially unable to employ counsel, the court shall appoint counsel as provided in Chapter 12 of Title 17, unless the accused elects to proceed without counsel.

(b) Whenever a deposition is taken at the instance of the state, the cost of any such deposition shall be paid by the state by the Prosecuting Attorneys' Council of the State of Georgia out of such funds as may be appropriated for the operations of the district attorneys.

(c) Depositions taken at the instance of an accused shall be paid for by the accused; provided, however, that, whenever a deposition is taken at the instance of an accused who is eligible for the appointment of counsel as provided in Chapter 12 of Title 17, the court shall direct that the reasonable expenses for the taking of the deposition and of travel and subsistence of the accused and the accused's attorney for attendance at the examination, not to exceed the limits established pursuant to Article 2 of Chapter 7 of Title 45, be paid for out of the fine and forfeiture fund of the county where venue is laid. (Code 1981, § 24-13-132, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-133. (Effective January 1, 2013) Manner of taking and filing deposition.

Except as provided in Code Section 24-13-137, a deposition shall be taken and filed in the manner provided in civil proceedings, provided that (1) in no event shall a deposition be taken of an accused party without his or her consent and (2) the scope of examination and cross-examination shall be such as would be allowed in the trial itself. On request or waiver by the accused, the court may direct that a

deposition be taken on written interrogatories in the manner provided in civil proceedings. Such request shall constitute a waiver by the accused of any objection to the taking and use of the deposition based upon its being so taken. If a judge has been designated to rule on objections or to preside over the deposition, objections to interrogation of the witness shall be made to and ruled on by such judge in the same manner as at the trial of a criminal proceeding. (Code 1981, § 24-13-133, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-134. (Effective January 1, 2013) Availability to state and defendant of deponent's previous statements.

The state or the accused shall make available to each other, for examination and use at the taking of a deposition pursuant to this article, any statement of the witness being deposed which is in the possession of the state or the accused and which would be required to be made available if the witness were testifying at the trial. (Code 1981, § 24-13-134, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-135. (Effective January 1, 2013) Admissibility and use of deposition.

At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if the witness is unavailable. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered, and any party may offer other parts. A witness is not unavailable if the exemption, refusal to testify, claim of lack of memory, inability, or absence of such witness is due to the procurement or wrongdoing of the party offering the deposition at the hearing or trial for the purpose of preventing the witness from attending or testifying. (Code 1981, § 24-13-135, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-136. (Effective January 1, 2013) Objections to admission of deposition.

Objections to receiving in evidence a deposition or part thereof may be made as provided in civil proceedings. (Code 1981, § 24-13-136, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-137. (Effective January 1, 2013) Recordation of deposition.

(a) Any party shall have the right to require that the deposition be recorded and preserved by the use of audio-visual equipment in addition to a stenographic record. The audio-visual recording shall be transmitted to the clerk of the court which ordered the deposition and shall be made available for viewing and copying only to the prosecuting attorney and accused's attorney prior to trial. An audio-visual recording made pursuant to this Code section shall not be available for inspection or copying by the public until such audio-visual recording has been admitted into evidence during a trial or hearing in the case in which such deposition is made.

(b) An audio-visual recording made pursuant to this Code section may be admissible at a trial or hearing as an alternative to the stenographic record of the deposition.

(c) A stenographic record of the deposition contemplated in this Code section shall be made pursuant to Code Section 9-11-28. (Code 1981, § 24-13-137, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-138. (Effective January 1, 2013) Agreement of parties to deposition.

Nothing in this article shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition by agreement of the parties with the consent of the court. (Code 1981, § 24-13-138, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-139. (Effective January 1, 2013) Depositions taken only in exceptional circumstances; misuse of procedures.

It is the intent of the General Assembly that depositions shall be taken in criminal proceedings only in exceptional circumstances when it is in the interests of justice that the testimony of a prospective witness be taken and preserved for use at trial. If the court finds that any party or counsel for a party is using the procedures set forth in this article for the purpose of harassment or delay, such conduct may be punished as contempt of court. (Code 1981, § 24-13-139, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 7

## PERPETUATION OF TESTIMONY

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-13-150. (Effective January 1, 2013) When proceedings to perpetuate testimony may be had.

Superior courts may entertain proceedings for the perpetuation of testimony in all proceedings in which the fact to which the testimony relates cannot immediately be made the subject of investigation at law and in which, for any cause, the common-law proceeding authorized under this title is not as available, or as completely available, as a proceeding in equity. (Code 1981, § 24-13-150, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-151. (Effective January 1, 2013) Inadequacy of usual proceeding to be shown.

A petition for discovery merely or to perpetuate testimony shall not be sustained unless some reason is shown why the usual proceeding at law is inadequate. (Code 1981, § 24-13-151, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-152. (Effective January 1, 2013) Materiality of possession of property; of availability of parties in interest.

The possession of the property is immaterial; nor shall the proceeding be denied though all parties in interest cannot be ascertained or reached. (Code 1981, § 24-13-152, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-153. (Effective January 1, 2013) Use of testimony.

Testimony taken in the proceedings contemplated under Code Section 24-13-150 shall be used only from the necessity of the case, but in such case may be used against all persons, whether parties to the proceeding or not. (Code 1981, § 24-13-153, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-13-154. (Effective January 1, 2013) Costs of proceedings.

The complainant shall in all cases be taxed with the costs of proceedings to perpetuate testimony. (Code 1981, § 24-13-154, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

# CHAPTER 14

# PROOF GENERALLY

## Article 1

## General Provisions



## Article 2

## Presumptions and Estoppel



## Article 3

## Particular Matters of Proof



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**Law reviews.** — For article, "Evidence," see 27 Ga. St. U. L. Rev. 1 (2011).

## ARTICLE 1

## GENERAL PROVISIONS

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-14-1. (Effective January 1, 2013) On whom burden of proof lies.

The burden of proof generally lies upon the party who is asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential. If a negation or negative affirmation is essential to a party's case or defense, the proof of such negation or negative affirmation shall lie on the party so affirming it. (Code 1981, § 24-14-1, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

**Law reviews.** — For article, "Dancing with the Big Boys: Georgia Adopts (most of) the Federal Rules of Evidence," see 63 Mercer L. Rev. 1 (2011).

### 24-14-2. (Effective January 1, 2013) Change of burden in discretion of court.

What amount of evidence will change the onus or burden of proof shall be a question to be decided in each case by the sound discretion of the court. (Code 1981, § 24-14-2, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-3. (Effective January 1, 2013) Amount of mental conviction required; preponderance of evidence in civil cases.

Moral and reasonable certainty is all that can be expected in legal investigation. Except as provided in Code Section 51-1-29.5 or Code Section 51-12-5.1, in all civil proceedings, a preponderance of evidence shall be considered sufficient to produce mental conviction. In criminal proceedings, a greater strength of mental conviction shall be held necessary to justify a verdict of guilty. (Code 1981, § 24-14-3, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-4. (Effective January 1, 2013) Determining where preponderance of evidence lies.

In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, the probability or improbability of their testimony, their interest or want of interest, and their personal credibility so far as the same may legitimately appear from the trial. The jury may also consider the number of the witnesses, though the preponderance is not necessarily with the greater number. (Code 1981, § 24-14-4, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-5. (Effective January 1, 2013) Reasonable doubt in criminal cases.

Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt. (Code 1981, § 24-14-5, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-6. (Effective January 1, 2013) When conviction may be had on circumstantial evidence.

To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused. (Code 1981, § 24-14-6, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-7. (Effective January 1, 2013) Positive testimony preferred over negative; exception.

The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed. This rule shall not apply when two parties have equal facilities for seeing or hearing a thing and one swears that it occurred while the other swears that it did not. (Code 1981, § 24-14-7, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-8. (Effective January 1, 2013) Number of witnesses required generally; exceptions; effect of corroboration.

The testimony of a single witness is generally sufficient to establish a fact. However, in certain cases, including prosecutions for treason, prosecutions for perjury, and felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness, except in prosecutions for treason. (Code 1981, § 24-14-8, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-9. (Effective January 1, 2013) Inferences from evidence or lack thereof.

In arriving at a verdict, the jury, from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved. (Code 1981, § 24-14-9, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

## ARTICLE 2

## PRESUMPTIONS AND ESTOPPEL

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-14-20. (Effective January 1, 2013) Presumptions of law and of fact distinguished.

Presumptions are either of law or of fact. Presumptions of law are conclusions and inferences which the law draws from given facts. Presumptions of fact shall be exclusively questions for the jury, to be decided by the ordinary test of human experience. (Code 1981, § 24-14-20, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-21. (Effective January 1, 2013) Rebuttable presumptions of law.

Certain presumptions of law, such as the presumption of innocence, in some cases the presumption of guilt, the presumption of continuance of life for seven years, the presumption of a mental state once proved to exist, and all similar presumptions, may be rebutted by proof. (Code 1981, § 24-14-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-22. (Effective January 1, 2013) Presumption from failure to produce evidence.

If a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted. (Code 1981, § 24-14-22, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-23. (Effective January 1, 2013) Presumption from failure to answer business letter.

In the ordinary course of business, when good faith requires an answer, it is the duty of the party receiving a letter from another to answer within a reasonable time. Otherwise, the party shall be presumed to admit the propriety of the acts mentioned in the letter of the party's correspondent and to adopt them. (Code 1981, § 24-14-23, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-24. (Effective January 1, 2013) Presumption of occupancy of railroad right of way.

In any proceeding to establish a right, title, or interest in or to real property that is a part of a railroad right of way, including a right of ingress or egress, where such proceeding is based upon occupancy of the railroad right of way by a person or entity other than the railroad corporation or railroad company, there shall be a presumption that any such occupancy of the railroad right of way is with the permission of the railroad corporation or railroad company. Such presumption may be rebutted. (Code 1981, § 24-14-24, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-25. (Effective January 1, 2013) Presumption of payment of check.

(a) As used in this Code section:

(1) "Bank" means any person engaged in the business of banking and includes, in addition to a commercial bank, a savings and loan association, savings bank, or credit union.

(2) "Check" means a draft, other than a documentary draft, payable on demand and drawn on a bank, even though it is described by another term, such as "share draft" or "negotiable order of withdrawal."

(b) In any dispute concerning payment by means of a check, a duplicate of the check produced in accordance with Code Section 24-10-1003, together with the original bank statement that reflects payment of the check by the bank on which it was drawn or a duplicate thereof produced in the same manner, shall create a presumption that the check has been paid. (Code 1981, § 24-14-25, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-26. (Effective January 1, 2013) Estoppels defined; enumeration generally.

(a) Conclusive presumptions of law are termed estoppels; averments to the contrary of such presumptions shall not be allowed. Estoppels are not generally favored.

(b) Estoppels include presumptions in favor of:

(1) A record or judgment unreversed;

(2) The proper conduct of courts and judicial officers acting within their legitimate spheres;

(3) The proper conduct of other officers of the law after the lapse of time has rendered it dangerous to open the investigation of their acts in regard to mere formalities of the law;

(4) Ancient deeds and other instruments more than 30 years old, when they come from proper custody and possession has been held in accordance with them;

(5) Recitals in deeds, except payment of purchase money, as against a grantor, sui juris, acting in his or her own right, and his or her privies in estate, in blood, and in law;

(6) A landlord's title as against his or her tenant in possession;

(7) Solemn admissions made in judicio; or

(8) Admissions upon which other parties have acted, either to their own injury or to the benefit of the persons making the admissions.

Estoppels also include all similar cases where it would be more unjust and productive of evil to hear the truth than to forbear investigation. (Code 1981, § 24-14-26, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-27. (Effective January 1, 2013) Estoppel relating to real estate.

(a) Where an estoppel relates to the title to real estate, the party claiming to have been influenced by the other party's acts or declarations shall not only have been ignorant of the true title, but also ignorant of any convenient means of acquiring such knowledge.

(b) Where both parties have equal knowledge or equal means of obtaining the truth, there shall be no estoppel. (Code 1981, § 24-14-27, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-28. (Effective January 1, 2013) Trustees estopped to set up title adverse to trust.

Trustees and other representatives with custody of papers have ample opportunities to discover defects in the title of property in their care and shall be estopped from setting up title adverse to their trust. (Code 1981, § 24-14-28, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-29. (Effective January 1, 2013) Equitable estoppel.

In order for an equitable estoppel to arise, there shall generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his or her injury. (Code 1981, § 24-14-29, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

ARTICLE 3

PARTICULAR MATTERS OF PROOF

**Law reviews.** — For article on the 2011 enactment of this article, see 28 Ga. St. U. L. Rev. 1 (2011).

### 24-14-40. (Effective January 1, 2013) Evidence of identity; burden in civil proceedings.

(a) Concordance of name alone is some evidence of identity. Residence, vocation, ownership of property, and other like facts may be proved. Reasonable certainty shall be all that is be required.

(b) In civil proceedings, parties shall generally be relieved from the onus of proving identity, as it is a fact generally more easily disproved than established. (Code 1981, § 24-14-40, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-41. (Effective January 1, 2013) Proof of de facto officer.

An officer de facto may be proved to be such by his or her acts, without the production of his or her commission or appointment. (Code 1981, § 24-14-41, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-42. (Effective January 1, 2013) Judgment admissible; effect.

A judgment shall be admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside. (Code 1981, § 24-14-42, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-43. (Effective January 1, 2013) Calendars as proof of dates.

Stern's United States calendar and Stafford's office calendar shall be admissible in proof of dates for the space of time covered by them respectively without further proof. (Code 1981, § 24-14-43, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-44. (Effective January 1, 2013) American Experience Mortality Tables.

In all civil proceedings where the life expectancy of a person shall be an issue, the American Experience Mortality Tables shall be admissible as evidence of the life expectancy of such person. (Code 1981, § 24-14-44, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-45. (Effective January 1, 2013) Other mortality tables.

(a) In addition to any other lawful methods of computing the value of the life of a decedent in wrongful death cases or of determining the present value of future due earnings or amounts in proceedings involving permanent personal injuries, there shall be admissible in evidence, as competent evidence in such proceedings, either or both of the following mortality tables:

(1) The Commissioners 1958 Standard Ordinary Mortality Table; or

(2) Annuity Mortality Table for 1949, Ultimate.

(b) In addition to the provisions set out in subsection (a) of this Code section, the jury or court shall be authorized in cases of wrongful death or permanent personal injuries to use any table determined by the jury or court, whichever is the trier of fact, to be accurate in showing the value of annuities on single lives according to the mortality tables listed in subsection (a) of this Code section.

(c) The admissible evidence provided for in subsections (a) and (b) of this Code section shall not be the exclusive method which the jury or court is required to use in such proceedings but shall be supplementary to other lawful and allowable evidence and methods for such purpose. (Code 1981, § 24-14-45, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-46. (Effective January 1, 2013) United States Department of Agriculture inspection certificates prima-facie evidence.

All inspection certificates issued by the United States Department of Agriculture over the signature of any inspector thereof which are admissible in courts of the United States as prima-facie evidence of the truth of the statements therein contained shall be admissible in all courts of the State of Georgia as prima-facie evidence of the truth of the statements therein contained. (Code 1981, § 24-14-46, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.

### 24-14-47. (Effective January 1, 2013) Proof that person is dead or missing as evidence.

(a) A written finding of presumed death made by officers or employees of the United States authorized to make such findings pursuant to any law of the United States or a duly certified copy of such finding shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and the date, circumstances, and place of his or her disappearance.

(b) An official written report, record, or duly certified copy thereof that a person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, made by an officer or employee of the United States authorized by any law of the United States to make the same shall be received in any court, office, or other place in this state as evidence that such person is missing, missing in action, interned in a neutral country, beleaguered, besieged, or captured by an enemy, dead or alive, as the case may be.

(c) For the purposes of subsections (a) and (b) of this Code section, any finding, report, record, or duly certified copy thereof purporting to have been signed by an officer or employee of the United States as is described in this Code section shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his or her authority. (Code 1981, § 24-14-47, enacted by Ga. L. 2011, p. 99, § 2/HB 24.)

**Delayed effective date.** — For information as to the delayed repeal and reenactment of this title, see the delayed effective date note at the beginning of this title.